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No. 11

# In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES, PETITIONER

v.

MARTIN WUNDERLICH, ANN M. WUNDERLICH,  
MARIE WUNDERLICH, E. MURIELLE WUNDERLICH  
AND THEODORE WUNDERLICH, A PARTNERSHIP,  
TRADING UNDER THE NAME OF MARTIN WUNDER-  
LICH COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES





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BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 159-170)  
is reported at 117 C. Cls. 92.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1950 (R. 170). A motion for a new trial, filed on August 14, 1950, was denied on October 2, 1950 (R. 171). By order of the Chief Justice, dated December 26, 1950, the time for filing

a petition for a writ of certiorari was extended to and including March 1, 1951 (R. 174). The petition, filed on February 28, 1951, was granted on May 7, 1951 (R. 175). The jurisdiction of this Court rests upon 28 U.S.C. 1255.

#### QUESTIONS PRESENTED

1. Whether the determination of the amount of an "equitable adjustment" for work covered by a change order is a question of fact within the standard form government construction contract provision that a department head's decision on "all disputes concerning questions of fact arising under this contract \* \* \* shall be final and conclusive upon the parties thereto."

2. Whether the Court of Claims may set aside such a determination in the absence of allegations, evidence, or findings of fraud or such gross error as necessarily implies bad faith.

#### CONTRACT PROVISIONS INVOLVED

Pertinent portions of the contract and specifications are set forth in Appendix A, *infra*, pp. 32-34.

#### STATEMENT

This litigation grows out of the construction of a dam under a standard form government contract (R. 67). The contractor reserved various claims on final settlement (R. 76), sued in the Court of Claims<sup>1</sup> and was allowed \$155,748.44 on Claim No.

<sup>1</sup>The contractor reserved 43 claims (R. 76) and brought suit on 21. Some of the claims were abandoned, and some were resolved in the contractor's favor by the contracting officer whose decision was affirmed by the department head.



17, the subject of this proceeding in this Court (R. 1-19, 170, 169). See Petition for Certiorari, p. 4.<sup>2</sup> Claim No. 17 arose out of the amount awarded as an equitable adjustment under a change order.

The main feature of the contract work was the dam embankment to be constructed of earth fill of varying degrees of coarseness, cobbles, and other materials (R. 67-68).<sup>3</sup> Fill materials unavailable from excavations were to be obtained "from borrow pits as directed by the contracting officer" (R. 54). The contractor was to be paid 23 cents per cubic yard for common excavation and transportation from earth borrow pits, and 35 cents per cubic yard for excavation, separation, and transportation from cobble borrow pits (R. 31). Borrow pit No. 2, the subject of the present claim, was shown on the contract drawings as one of two earth borrow pits (R. 113).<sup>4</sup>

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<sup>2</sup> The Court of Claims allowed recovery on six contested claims in all, totalling \$164,760.83. Four claims (on which the contractor was satisfied with the departmental ruling but with respect to which payment had not yet been made) were not contested by the Government and eleven more were either abandoned or denied (R. 77, 160, 166-170).

<sup>3</sup> The cobble-fill portions of the embankment were to consist of cobbles over 2½ inches in diameter (R. 61). The earth-fill portions were to consist of a mixture of clay, sand, and gravel and were to contain no stones having maximum dimensions greater than five inches. Stones over five inches in size were to be removed by the contractor from otherwise approved earth-fill materials (R. 58, 59).

<sup>4</sup> The drawings also showed a cobble borrow pit, which was never used as such (R. 113).

After some earth fill excavations in 1938, this borrow pit was found to contain a large quantity of cobbles exceeding five inches in diameter (R. 114). In November 1939, when ordered to obtain additional coarse material from this pit, the contractor objected to performing the work as common excavation at 23 cents per cubic yard, contending that the large amount of oversized cobbles requiring separation warranted payment at the 35 cent rate (R. 114-115).

Following extended fruitless negotiations, change order No. 3 was issued pursuant to Article 3 of the contract (Appendix A, *infra*, p. 32), directing the contractor, in lieu of obtaining cobbles from the cobble borrow pit area (see note 4. *supra*), to use the cobbles separated from borrow pit No. 2 (R. 120-121).

The contractor thereafter filed a claim for adjustment of the amount due under the change order in the amount of \$334,994.942, subsequently increased twice (R. 121, 125), based upon its cost of performance plus 10% for superintendence, general expense and profit (R. 121). In so doing, the contractor followed the formula provided by paragraph 10 of the contract specifications (Appendix A, *infra*, p. 33) for "extra work \* \* \* not covered by the specifications or included in the schedule" (R. 10).

Although there was no order for payment in this manner, the contracting officer found that adjust-

ment on this basis would be equitable (R. 122). With exceptions now immaterial, the contracting officer accepted the contractor's figures for hours of labor and rates of pay, for hours of use of equipment, and for cost of materials (R. 121), but found that the rates submitted (1) for field repairs and maintenance and (2) for rental of equipment, were excessive, and allowed considerably less than the contractor claimed (R. 122).

For the contractor's maintenance and repair rates found to be excessive, the contracting officer substituted rates derived from Bureau of Reclamation experience on other projects, from work by government forces, and from experiences and practices of the Forestry Service, Bureau of Public Roads, Tennessee Valley Authority, and Colorado State Highway Department (R. 129; Deft. Ex. 17-V, p. 2).

To determine the rental allowance, both the contractor and the contracting officer used an ownership rental schedule published by the Bureau of Reclamation in deriving the divergent rental rates (R. 125). This schedule, based upon a similar schedule, published by the Associated General Contractors of America (Pltf. Ex. 17-B), lists annual rental rates for various items of construction equipment (R. 125). Dividing the annual rental rate for each item of equipment by the number of hours in an eight-month working season, at two eight-hour shifts for 30 days each month,

the contracting officer arrived at the hourly rate used in his determination. This rate was then applied to the number of hours of operation in borrow pit No. 2 during 1940 to arrive at the rental allowances for the equipment. No additional allowance was made for idle time. (R. 127.)

The contracting officer found that \$40,400.15, in addition to the \$194,784.93 already paid, was an equitable adjustment for the excavation in borrow pit No. 2 during 1940 (R. 122). This represented additional compensation of \$0.0477 per cubic yard, which the contracting officer then allowed for the 79,847 cubic yards excavated in borrow pit No. 2 during 1939 (*id.* p. 50; R. 122). Thus, his total award was \$44,208.85 (R. 122, 125). On appeal, the Secretary of Interior affirmed this decision (R. 125).<sup>5</sup>

The contractor sought recovery in the present suit of \$181,721.10 in additional compensation for this work (R. 9-10). The Government, in its "Request for Special Findings of Fact and Brief" in the Court of Claims argued at length that, under Article 15 of the contract (R. 161-166), the departmental resolution of factual issues is final in the absence of allegation and proof of bad faith, fraud or gross mistake, citing *United States v. Moorman*, 338 U.S. 457. Nevertheless, the Court of Claims held erroneous the

<sup>5</sup> The findings and decision of the contracting officer and the department head, part of the original transcript of record transmitted to the Court, are reprinted as Appendix B to this brief, *infra*, pp. 34-49.



amounts allowed both for maintenance and repair and for rental allowance. The court held that the contracting officer's computed hourly rate for rental allowances failed to provide compensation for idle time and, therefore, was "completely unrealistic and unfair" (R. 168). Applying a formula which made allowance for idle time, the court concluded that proper rental rates would total some \$30,000 more than allowed (R. 129). The allowances for field repairs and maintenance were also held to be erroneous (R. 168-169). The court held that actual costs had been improperly discarded and arbitrary hourly figures substituted (R. 168).

In an order dated June 27, 1950, on the contractor's motion, the court amended its findings of June 5, 1950, to state that the department's method of computing rental rates and the method of computing costs for repair and maintenance were "arbitrary and capricious, and the result arrived at \* \* \* grossly erroneous" (R. 170-171).

Using rates it regarded as correct, the Court of Claims allowed the contractor a total of \$155,748.44, instead of the department head's equitable adjustment of \$44,208.85 (R. 132, 169).<sup>9</sup>

<sup>9</sup> The claim here involved, No. 17, covered a period of two years, 1939 and 1940. For 1940, the Court of Claims awarded \$146,166.80 as additional compensation in lieu of the \$40,400.15 allowed by the department head (R. 132). While this amounted to 17 cents per cubic yard, the court concluded that the contractor was entitled to 12 cents per cubic yard for the 79,847 cubic yards excavated in 1939, or \$9,581.64 rather than the \$3,808.70 deemed equitable by the Secretary of Interior (R. 132).

## SPECIFICATION OF ERRORS TO BE URGED

## The Court of Claims erred:

1. In holding that the determination of an "equitable adjustment" for work performed pursuant to a change order under Article 3 of the contract was a question of law rather than a question of fact.

2. In failing to hold, in accordance with *United States v. Callahan Walker Co.*, 317 U.S. 56, that the provision for final determination of disputes concerning questions of fact in Article 15 of the contract was applicable to the dispute involved in Claim No. 17 over an equitable adjustment for work performed pursuant to a change order under Article 3.

3. In setting aside the decision of the department head, without finding that the decision was fraudulent or so grossly erroneous as necessarily to imply bad faith, despite the contractor's agreement in Article 15 of the contract to accept decisions "concerning questions of fact" as "final and conclusive."

4. In setting aside the decision of the department head despite the fact that the plaintiff made no allegation of fraud or of such gross error as necessarily to imply bad faith.

5. In holding that the department head's rulings on Claim No. 17 were "arbitrary and capricious" and "grossly erroneous" despite the facts that (a) there was no evidence of bias, prejudice, haste, or

caprice in the administrative determination; (b) there was evidence to support the administrative determination; and (c) the standards guiding the administrative decision were relevant, intelligible, and reasonable.

6. In giving judgment for the plaintiff for \$155,748.44 in lieu of the administrative award of \$44,208.45.

#### SUMMARY OF ARGUMENT

### I

The dispute in this case relates to the amount of an equitable adjustment made pursuant to a change order authorized by the terms of a standard government construction contract. Under Article 15 of the contract, the decision of the head of the department is final and conclusive with respect to all factual disputes arising under the contract. Since this Court has held that the determination of the amount of an equitable adjustment is a factual question (*United States v. Callahan Walker Co.*, 317 U.S. 56), it follows that the matter in dispute is clearly within the compass of Article 15.

### II

In these circumstances, the decision of the head of the department is final and binding in the absence of fraud, bad faith or the failure to exercise an honest judgment. See, e.g., *United States v. Moorman*, 338 U.S. 457. But the case was tried in the Court of Claims on no such theory. There

were no allegations of fraud or bad faith and this question was never put in issue by the contractor, as required by the decisions of this Court, it being suggested, if at all, only on his motion to amend the findings of the court below. Moreover, the finding of the Court of Claims that the department head's method of computation was arbitrary, capricious and grossly erroneous is not a finding of fraud, bad faith, or actual dishonesty, frequently reiterated by this Court as a necessary condition to setting aside the decision of a contractually designated agent. But even if the court below be deemed to have made the appropriate finding, the evidence upon which it was based clearly demonstrates that it must have misconceived the fundamental quality of bad faith required. The evidence is consistent only with a finding that an honest decision, even if it be deemed erroneous, was rendered. Insistence upon the maintenance of stringent standards of procedure and proof with respect to the narrow issue of fraud or bad faith is necessary if the contract rights which the Government has bargained and paid for and the decisions of this Court of almost one hundred years are to be preserved.

#### ARGUMENT

This case represents another attempt by the Government to make effective that for which it bargains and pays—the customary provision in standard construction contracts for the final settle-



ment of disputes without complex and protracted litigation. See *United States v. Moorman*, 338 U.S. 457. The Court of Claims' reason for not holding the department head's decision conclusive, as provided by Article 15, is not entirely clear. In a section of its opinion which introduced its discussion of a series of claims, including the claim involved here, the court held that the conclusive effect of Article 15 was limited to disputed questions of fact, and that the contested claims were not within its scope (R. 161-166). It then proceeded to consider the individual "claims upon their merits" (R. 166). It would thus appear that the court held Claim No. 17 not governed by Article 15.<sup>7</sup>

With specific reference to this Claim No. 17, the court explicitly held that the decision under Article 15 "was arbitrary and capricious" (R. 168-169), and later added that the result arrived at by the departmental method of computation was "grossly erroneous" (R. 170-171).

Neither basis of decision, however, justifies setting aside the department head's determination: (1) the matter in dispute was clearly related to a question of fact within the compass of Article 15, and (2) no valid basis is present for rejecting the departmental decision on the disputed factual question.

<sup>7</sup> Respondent has steadfastly maintained, however, that the court's discussion did not relate to the claim in issue here and that the department head's decision was set aside for other reasons (Brief in Opposition, pp. 9-10).

### The Dispute Concerned Questions of Fact

In *United States v. Callahan Walker Co.*, 317 U.S. 56, this Court held, reversing the Court of Claims, that a dispute over the amount of an equitable adjustment under an Article 3 change order posed "inquiries of fact" and that the provisions of Article 15 were applicable.

The rule of *Callahan Walker* is directly applicable and cannot be avoided on the theory that paragraph 10 of the contract specifications dealing with "extra work," rather than Article 3, is the contract provision governing the equitable adjustment involved here.<sup>8</sup>

The order for changes was expressly and properly issued pursuant to Article 3 as a change "in the drawings and/or specifications" of the contract—namely, a change in the designated source of cobbles for the embankment (R. 120). Paragraph 10 of the specifications, on the other hand, deals with "extra work \* \* \* not covered by the specifications or included in the schedule" (R. 34), and would seem to be irrelevant to the work in-

<sup>8</sup> In determining the equitable adjustment, the contracting officer and the department head concluded that cost plus ten percent, the basis on which the contractor submitted its claim and the basis on which paragraph 10 of the contract specifications happens to provide for extra compensation, would constitute an equitable basis for settlement of the claim for 1940 excavation (R. 122, 34-35).

volved here which was both "covered by the specifications" and "included in the schedule."<sup>9</sup>

But even if paragraph 10 is applicable, the nature of the dispute brings it squarely within the *Callahan Walker* decision. Paragraph 10 provides for the determination of cost "by the contracting officer." This is precisely the kind of question which was held to be one of fact in the *Callahan Walker* case. No valid basis exists, therefore, for holding Article 15 inapplicable to the present dispute.

## II

### The Departmental Decision Is Conclusive in the Absence of Fraud or Bad Faith, and Neither Was Shown in This Case

*A. The departmental decision can be disturbed only upon a showing of fraud or bad faith.*—Since Article 15 is clearly applicable, the court's failure to give it effect conflicts squarely with the decisions of this Court. The contract terms, providing for

<sup>9</sup> Paragraph 52 of the specifications (R. 54) provided that all materials for the embankment which were not available from required excavations were to be taken from borrow pits as directed by the contracting officer. That officer was to direct the location and extent of borrow pits and the Government reserved the right to change or add locations. Paragraph 55 (R. 58) required the contractor to remove stones with dimensions greater than five inches in otherwise approved earth materials and to place such stones in the cobble-fill portion of the embankment at the direction of the contracting officer.

Throughout this dispute, there has been disagreement as to whether the work in borrow pit No. 2 should have been classified for payment as common excavation, or as cobble excavation. Whichever classification would have been correct, it is clear that the work was "included in the schedule."

final departmental-determination of disputes of fact, "are clear and precise, leaving no room for doubt as to the intention of the contracting parties. They seem to be susceptible of no other interpretation than that the action of the [government official] \* \* \* was intended to be conclusive." *Kihlberg v. United States*, 97 U.S. 398, 401. It is "the duty of trial courts to recognize the right of parties to make and rely on such mutual agreements." *United States v. Moorman*, 338 U.S. 457, 461.

The obvious purpose of such provisions is to avoid the expense and delay of litigation. Cf. *United States v. Holpuch Co.*, 328 U.S. 234, 239-240; *Martinsburg & Potomac R.R. Co. v. March*, 114 U.S. 549, 553. Equally obviously, this purpose is defeated if parties who agree to the contract terms can have them nullified because they are dissatisfied with a decision by which they have contracted to be bound. Moreover, the advantages of competitive bidding will be lost to the Government if contractors are requested to submit bids on the basis of a contract providing for the final settlement of disputes by the department head, and the successful bidder is later permitted to disregard this requirement which undoubtedly was given substantial weight in the bids of others.

The judicial function in these situations is quite different from that traditionally involved in the review of administrative determinations. Article 15 is a contractual not a statutory provision. It



embodies a deliberate bargain voluntarily entered into by both parties that the department head's decision is "final and conclusive upon the parties," if made honestly and in good faith, and is not to be the subject of court litigation. Like every other provision of a government contract, it is an element which doubtless affects the contract price. If the provision be deemed advantageous to the Government, the advantage has been bought and paid for and is entitled to as much effect as other agreements to arbitrate differences. This contractual aspect has been emphasized in virtually all the decisions which have denied review on the merits of the dispute. "Parties competent to make contracts are also competent to make \* \* \* agreements" which provide that the agent of one of the parties may conclusively "decide every question which can or may arise relative to the execution of the contract." *United States v. Moorman*, 338 U.S. at 461. As the Court pointed out in the *Moorman* case, "Similar agreements have been held enforceable in almost every state" (p. 462).

Accordingly, this Court, uniformly holding provisions of the type in question valid and enforceable, has ruled repeatedly that "Findings of such a contractually designated agent, even where employed by one of the parties" will be "held conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith." *United States v. Moorman*, 338 U.S. 457, 461. See also *United States v. Gleason*, 175 U.S. 588;

602; *United States v. McShain, Inc.*, 308 U.S. 512, 520; *Merrill-Ruckgaber Co. v. United States*, 241 U.S. 387, 388, 393; *Plumley v. United States*, 226 U.S. 545, 547; *Martinsburg & Potomac R.R. Co. v. March*, 114 U. S. 549, 553-554; *Kihlberg v. United States*, 97 U.S. 398, 402; *United States v. Callahan Walker Co.*, 317 U.S. 56; *United States v. Blair*, 321 U.S. 730; *United States v. Beuttas*, 324 U.S. 768; *United States v. Holpuch Co.*, 328 U.S. 234.

The decision of the Secretary of the Interior in the instant case cannot be impeached on the ground that it was permeated with fraud or rendered in bad faith.

B. *Neither fraud nor bad faith was put in issue.*—In this case, the contractor did not even allege that the department head's decision was fraudulent or made in bad faith or so grossly erroneous as necessarily to imply bad faith. This was not an issue at the trial and the court below, rejecting the Government's argument that the departmental findings could be set aside only on a showing of fraud or bad faith, did not purport to be trying any question except the "claims upon their merits" (R. 166).<sup>10</sup> Proofs were not directed to the single material question—whether, in the light of the evidence before him, the department head had reached a decision which could only be explained as resulting from fraud or bad faith.

In these circumstances, the petition could have

<sup>10</sup> This is conceded in respondent's Brief in Opposition, p. 2.

been dismissed for failure to state a cause of action. But, more important, because of the failure of the contractor to place the crucial question in issue, the Government never had any occasion to defend itself against a charge of fraud or bad faith. No such charge was ever made. Obviously, the affirmative evidence, cross-examination and rebuttal evidence directed to the issue of fraud would differ sharply from that directed to the issue of reasonable cost.

As long ago as the 1878 Term, in *Kihlberg v. United States*, 97 U.S. 398, in holding that the designated agent's decision "cannot \* \* \* be subjected to the revisory power of the courts without doing violence to the plain words of the contract," the Court observed that "There is neither allegation nor proof of fraud or bad faith upon his part" (p. 401). Five years later, in *Sweeney v. United States*, 109 U.S. 618, the contract provision for a designated agent's decision as to performance was held, in reliance upon the *Kihlberg* case, to preclude evidence or findings with respect to compliance with the contract in the absence of a showing of fraud or bad faith. In *Martinsburg & Potomac R.R. Co. v. March*, 114 U.S. 549, the following term, the Court, relying specifically upon the *Kihlberg* and *Sweeney* decisions, held that "there is no allegation that entitled the plaintiff to go behind it [the engineer's decision]; for, there is no averment that the engineer had been guilty of fraud, or had made such

gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him. The first count of the declaration was, therefore, defective for the want of proper averments showing plaintiff's right to sue on the contract, and the demurrer to that count should have been sustained" (p. 553). Again, in *United States v. Gleason*, 175 U.S. 588, decided in 1900, the Court pointed out that judicial revision of the decision of a contractually designated agent "could only be done upon allegation and proof of bad faith" (p. 607).<sup>11</sup>

<sup>11</sup> The weight of these decisions can hardly be deemed overturned by either *Ripley v. United States*, 223 U.S. 695, or *United States v. Smith*, 256 U.S. 11, relied on by respondent (Brief in Opposition, pp. 11-12). In *Ripley v. United States*, this Court twice remanded the case to the Court of Claims (220 U.S. 491; 222 U.S. 144) for a precise finding on the specific issue of bad faith. Upon the first remand, 220 U.S. at 496, the Court of Claims was required "to explicitly find whether or not that which it states was manifest was or was not known to the inspector and whether that subordinate official acted in good or bad faith in the various refusals recited." On the second occasion, the Court of Claims finding was regarded as still deficient because it did not contain "a finding as to knowledge on the part of the inspector and an unequivocal finding as to his good or his bad faith" (222 U.S. at 147). It cannot be assumed that this Court contemplated findings of this precise character without the production of evidence directed to the particular issue.

In the *Smith* case, it does not appear that any contractual provision for a departmental decision was squarely applicable to the dispute in question. In any event, the Court obviously did not regard the dispute as within any such provision and merely held that a contract to remove "clay, sand, gravel, and boulders" did not obligate the contractor to remove "a bed of limestone rock" (256 U.S. at 17). Moreover, the Court's decision in the *Smith* case must be read in the light of the more recent decision in *United States v. Blair*, 321 U.S. 730, 736.

Respondent contends further (Brief in Opposition, p. 12)



These decisions, as recently reaffirmed in *United States v. Moorman, supra*, have been understood to deny the right "to have the cause litigated on its merits" and to confine "the case to the question of the contracting officer's fraud or gross mistake implying bad faith." *Lindsay v. United States*, 181 F. 2d 582, 584 (C.A. 9). It also has been held that an issue framed on the merits of the dispute "could not properly be brought before the court" and that "the receipt of evidence" on this issue "was a futility." *United States v. Foster Transfer Co.*, 183 F. 2d 494, 496, 497 (C.A. 9).

C. *Neither fraud nor bad faith was found by the Court of Claims.*—But even if the defect in the pleadings and the issue framed be overlooked, the court's findings fall short of the test laid down by this Court as necessary to justify "reconsidering the questions decided by the designated agent of the parties" (*United States v. Moorman*, 338 U.S. at 463). For there is no statement or suggestion that the "gross error" it attributes to the Secretary of Interior warrants an inference of bad faith.

After it had considered the contractor's claims "upon their merits" and promulgated its findings and opinion on June 5, 1950 (R. 66), the court below, on the contractor's motion, added to its find-

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that the Government's awareness of the issue of good faith was evidenced by the statement of its counsel in the course of trial "that the only controversy now between the parties is as to the fairness of the so-called rental rate." We submit that the issue of the "fairness" of a rate is at opposite poles with the issue of the honesty of the person who is charged with deciding what is a fair rate.

ings statements that the departmental calculation of the equitable adjustment was "arbitrary and capricious, and the result arrived at by that method was grossly erroneous" (R. 170-171).

Unless this case is to be the occasion for overruling a century of precedent, the failure to find fraud, bad faith or, in other words, a dishonest judgment, precludes judicial interference with the contract of the parties. This rule has "never been departed from by this Court." *United States v. Moorman, supra*, at 461.

As long ago as *Burchell v. Marsh*, 17 How. 344, this Court ruled that if an award "contains the honest decision of the arbitrators" it will not be set aside for "mere error of judgment" (pp. 349, 350). It warned against treating "the arbitrators as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given" (p. 350), and concluded, even though it regarded the assessment of damages as arbitrary, that the arbitrator's decision was not "so outrageous as of itself to constitute conclusive evidence of fraud or corruption" (p. 351).

In the *Kihlberg* case, *supra*, decided some 20 years later, we find articulation of the rule in almost the precise terms in which it has survived to the present day. In that case, the fixing of distances for which the Government was to pay transportation charges was committed to a chief army quartermaster. Although the distances so fixed

were alleged to be somewhat less than "the distances by air line, or by the road usually travelled", the Court held that "in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive" (97 U.S. at 401, 402).

In virtually identical language, this formulation of the rule has been repeated in numerous decisions of this Court. *Sweeney v. United States*, 109 U. S. 618, 620 (1883) ("the court below found that there was neither fraud, nor such gross mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment"); *Martinsburg & Potomac R. R. Co. v. March*, 114 U. S. 549, 553 (1885) ("there is no averment that the engineer had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment"); *Chicago & Santa Fe Railroad v. Price*, 138 U. S. 185, 195 ("there is no fact distinctly found indicating fraud \* \* \* or such gross mistakes \* \* \* as imply bad faith"); *United States v. Gleason*, 175 U.S. 588, 602, 609 (1900) ("in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts"); *Ripley v. United States*, 222 U.S. 144, 148 (1911) (the court must find "gross mistake" such as "excluded the possibility of the exercise

of an honest judgment," and make "a direct and unequivocal finding as to \* \* \* bad faith"); *Ripley v. United States*, 223 U.S. 695, 704 (1912) (there must be "fraud, or gross mistake implying fraud"); *Goltra v. Weeks*, 271 U.S. 536, 548 (1926) (judgment conclusive "in the absence of bad faith"); *United States v. Callahan Walker Co.*, 317 U.S. 56, 59 (1942) ("no findings that the contracting officer \* \* \* did not honestly decide"); *United States v. Moorman*, 338 U.S. 457, 461 (1950) (departmental findings "conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith").

To preserve the contract of the parties, the rule has been stringently maintained against subtle relaxation. On at least two occasions, this Court has rejected a finding of "gross mistake" as the basis for upsetting the contractual decision. In *Martinsburg & Potomac R. R. Co. v. March, supra*, the jury was instructed that the final estimate of the engineer was conclusive unless he was guilty of fraud, intentional misconduct, or "gross mistake." It was held that "this modification was well calculated to mislead the jury, for they were not informed that the mistake must have been so gross, or of such a nature, as implied bad faith" (114 U.S. at 553). Similarly, in *Ripley v. United States, supra*, a finding of "gross mistake" was not regarded as a sufficient basis for implying "bad faith" (222 U.S. at 148). Other characteriza-



tions of the contractual agent's decision, such as "inadequate and unjust" (*Martinsburg & Potomac R.R. Co. v. March, supra*, at 554-555), and "wrongful and unjust" (*United States v. Gleason, supra*, at 608), have been held insufficient to overturn it.

In the light of this old and well-established doctrine, rejection by the court below of the decision of the contractually designated agent was error since it made no finding of fraud, bad faith, or the failure to exercise an honest judgment.

D. *The record contains no evidence upon which a finding of fraud or bad faith could be rested.*—The Court of Claims was apparently of the view, however, that its findings provided a sufficient basis for upsetting the decision of the Secretary of the Interior (R. 168-169).<sup>12</sup> Since the opinion specifically addressed itself to this Court's decision in the *Moorman* case (R. 162-163), we must assume that the court was aware of the necessity of finding fraud or bad faith. But if the court regarded its finding as one of bad faith, not only did it not say so but the finding, if made, would also be without evidentiary support in the record.

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<sup>12</sup> Its opinion (R. 159, 168-169) contains the following:

We conclude that the plaintiff did not agree, by signing this contract, to be bound by administrative decisions made in disregard of the practices of trade, of proper accounting methods, and of the known facts as to actual costs. Nor did it agree to be bound by computations based on arbitrarily chosen figures which on their face show that they must be wrong. We conclude that the administrative treatment of this important claim of the plaintiff was arbitrary and capricious.

Going beyond the pleadings and findings, we have brought to this Court all of the trial record bearing on the claim under consideration here to show that there could be no justification for a finding, assuming the Court of Claims has made it, of the kind of gross error implying bad faith which would warrant revision of the ruling made final by Article 15.<sup>13</sup> The record is devoid of any suggestion of bias, haste, or bad will.<sup>14</sup> It shows, on the contrary, that the contractor's claims were considered dispassionately, intelligently, at length, and in painstaking detail.

The court below, using what it describes as "proper accounting methods" (R. 168) which allow for idle time, has awarded an amount substantially higher than that found equitable by the Secretary of Interior as a rental allowance for the contractor's equipment. But the court itself has made the basic error of applying the equipment rental schedule promulgated by the Bureau of Reclamation as an inflexible tariff rather than a guide to be adapted to the circumstances of the given case.<sup>15</sup> As a

<sup>13</sup> The entire transcript of testimony has been transmitted to this Court (R. 172, 173, 174). For the convenience of the Court the Government has reprinted in a separate volume, as Appendix C to its brief, all the testimony "which either party deems to be material to the errors assigned" (R. 172).

<sup>14</sup> The Court of Claims found (R. 69) that relations between the contractor's employees and the Government's field force were "at all times cordial and cooperative."

<sup>15</sup> Accompanying the equipment rental schedule published by the Associated General Contractors of America, Inc. upon which the Bureau of Reclamation schedule is based, is the cautionary observation that "the rates are not determinable

result, the court has overlooked the fact, stressed by the contracting officer and the department head (Deft. Ex. 17-V, p. 1; Pltf. Ex. E, p. 15, Appendix B, *infra*, p. 47), that the work in borrow pit No. 2 was only one item under the contract and, as the respondent concedes (Br. in Opp., p. 6), that the contractor's "equipment was constantly shifting back and forth between work in Borrow Pit No. 2 and other items of the work."

It was reasonable for the contracting officer and the department head to assume that the rates paid for other work under the contract, which called for use of the same equipment, provided adequate compensation for any time the equipment was required to remain idle. Consequently, the inclusion of an idle time factor for additional work not contemplated in the original contract would necessarily result in duplication. In view of the department head's finding that the equipment "was used continuously on a two-shift basis on some part of the project," his decision appears clearly correct in holding that "hourly rates shown in the rental schedule, applicable only when equipment is used for short periods, or intermittently, and intended to compensate for moving and setting up equipment for short-time jobs, cannot be allowed." (Plfs. Ex. E, p. 15, Appendix B, *infra*, p. 47.)

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by any precise method of accounting and should always be applied in the light of personal experience." Pltf. Ex. 17-B, p. 1.

But even if this judgment is incorrect, the manner of consideration of the question destroys any possibility that the decision was dishonest. This conclusion is fortified by the finding of the contracting officer that the rates employed "have been accepted by other contractors as equitable in payment of extra work at cost plus" and "are, in fact, higher than rates for some equipment used on War Department projects for similar work" (Pltfs. Ex. C, pp. 49-50, Appendix B, *infra*, pp. 42-43), and the finding of the department head that "the rates have been found fair by the Bureau of Reclamation and by other contractors in the past," and that "the contractor offers no proof to support its claim that the rental rates submitted by it are justifiable" (Pltfs. Ex. E, pp. 14-15, Appendix B, *infra*, pp. 46, 47).

Similarly, in computing allowances for field repairs and maintenance, the Secretary of Interior approved criteria and data which repel the inference of fraud or such gross error as implied bad faith. The rates allowed "were determined by the contracting officer on the basis of Bureau of Reclamation experience on similar work and the experience and research of other Federal and State agencies." (Pltfs. Ex. E, p. 15, Appendix B, *infra*, p. 48; Deft. Ex. 17-V, p. 2). The department head's decision also noted that the contractor had offered "no proof that such rates are unfair in this instance" (Pltf. Ex. E, p. 15, Appendix B, *infra*, p. 48).



The Secretary of Interior, particularly in view of the technical knowledge at his disposal, had at least as much right as a jury would have in a comparable situation to reject the contractor's figures as inaccurate or so unjustifiably high that they could not be deemed "equitable."<sup>10</sup> Certainly, there would be such right when, as here, the contractual provision upon which the contractor relied by analogy (Paragraph 10 of the Specifications; see *supra*, p. 4) guarantees not "actual cost" but "actual necessary costs". [Emphasis supplied].

It is not our purpose, however, to show that the department head's decision was "correct" or that the court below was "wrong" in estimating the equitable adjustment to which the contractor was entitled. Even if it be thought that evidence of experience on other projects is not the "correct" or the best method of ascertaining the proper amount of an equitable adjustment in a particular case, it is not the kind of error which can be regarded as tainted with fraud, bad faith or dishonesty. We believe it is amply clear from the record that the Department's determination in

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<sup>10</sup> While a government engineer so testified before the Commissioner (Tr. 1710), neither the contracting officer nor the department head in his written decision suggested the possible explanation that the contractor's excessive maintenance rates might have resulted from improper inclusion of cost of major repairs. But whether this hypothesis occurred to them or not and whether it was correct or not, the important point is that, on the basis of technical advice the good faith of which has not been impugned, the department head found the contractor's figures excessive. It would seem, therefore, that the stress in the opinion below (R. 168) on the absence of evidence that major repairs were made is immaterial.

this case was reasoned, plausible, and wholly devoid of any evidence to justify the suspicion, much less make necessary the inference, that it was motivated by bad faith.

Since the finding of the Court of Claims represents no more than a disagreement, in matters involving judgment, with the departmental decision, fraud or bad faith can be deemed to exist only in the imputed sense in which it was found in *Penner Installation Corp. v. United States*, 114 C. Cls. 571, 116 C. Cls. 550, affirmed by an equally divided Court, 340 U.S. 898.

Shortly after announcement of his Court's decision in the *Moorman* case, the Court of Claims modified its findings in the *Penner* case, in which it had previously awarded judgment based on mere disagreement with departmental findings, to include, without any change in pleadings or the evidence, a new finding that the decision of the department head was arbitrary and so grossly erroneous as to imply bad faith. In that case, bad faith was found to flow from the combination of what the court considered substantial error and the lack of impartiality of the departmental head deduced from the fact that he was an employee of the Government and had made an erroneous decision.

Since the department head is customarily designated final arbiter, the Court of Claims could find the same lack of impartiality in every case in which it believed substantial error existed, and

conclude that the error and lack of impartiality together constituted "bad faith".<sup>17</sup> Surely, this Court's insistence upon actual bad faith and not mere error cannot be defeated by a chain of reasoning which infers lack of impartiality from error, and bad faith from lack of impartiality.

Unless appropriate standards of proof are established, therefore, the unbroken line of decisions of this Court upholding Article 15 and comparable provisions may be rendered meaningless. To avoid this result it is necessary, we believe, to strike down the *Penner* reasoning and to require issues in the Court of Claims to be made not on the merits of a claim but on the specific issue of fraud or bad faith, in the sense of actual dishonesty, as the decisions have held. The specific allegation of fraud or bad faith should be required and only evidence directed toward the proof of that allegation should be admitted.

Evidence going to the merits of the claim should be excluded unless it is also shown that this evidence had been presented for departmental consideration and was rejected not because of any disagreement

<sup>17</sup> In *The Great Lakes Dredge & Dock Company v. United States*, 116 C. Cls. 679, the Court of Claims concluded that an equitable adjustment was "lacking in that impartiality demanded in the settlement of disputes arising between a contractor and the Government" (p. 683), and set aside the decision of the head of the department as "arbitrary and capricious and so grossly erroneous as to imply bad faith." The Court said (116 C. Cls. at 684) "When we say that bad faith is to be implied, we mean only what in *Penner Installation Corporation v. United States*, *supra*, we said this expression connotes".



with respect to its value, but because of bad faith. It is obvious that a finding of "gross error" which "necessarily" gives rise to the inference of bad faith on the part of the designated agent, must be predicated upon an appraisal of the evidence which the agent had before him at the time he acted. A man cannot act in bad faith by failing to accord weight to evidence which he has neither seen nor heard; likewise, the reviewing court is not in a position to conclude that the agent's decision was so grossly erroneous as necessarily to imply bad faith if the evidence upon which the agent based his decision is unknown to the court.

In *Ripley v. United States*, 220 U.S. 491, although the Court of Claims had found that the Government's designated agent had improperly refused to allow the imposing of crest rocks on a jetty at a time when "it was manifest" that the conditions for performing that work were satisfied, this Court returned the record to the Court of Claims "to explicitly find whether or not that which [the court] states was manifest was or was not known to the inspector." 220 U.S. at 496. See, also, *Ripley v. United States*, 222 U.S. 144, 147-148; *Burchell v. Marsh*, 17 How. 344, 349-350.

Only if the issue of fraud or bad faith is sharply drawn by the requirement of proper pleading, if proof is limited to evidence directly probative of the narrow issue, and if nothing short of a finding of actual fraud or bad faith adequately supported



will be permitted to impugn the designated agent's decision, can the Government hope to avoid the vexatious litigation which it has sought to guard against in its contracts. In the present case, fraud or bad faith was neither pleaded, proved nor found.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

PHILIP B. PERLMAN,  
*Solicitor General.*

HOLMES BALDRIDGE,  
*Assistant Attorney General.*

PAUL A. SWEENEY,  
MORTON LIFTIN,

*Attorneys.*

SEPTEMBER, 1951.

## APPENDIX A

Article 3 of the contract provides:

*Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 15 of the contract provides:

*Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 10 of the specifications provides:

*Extras.*—The contractor shall, when ordered in writing by the contracting officer, perform extra work and furnish extra material, not covered by the specifications or included in the schedule, but forming an inseparable part of the work contracted for. Extra work and material will ordinarily be paid for at a lump-sum or unit price agreed upon by the contractor and the contracting officer and stated in the order. Whenever in the judgment of the contracting officer it is impracticable because the nature of the work or for any other reason to fix the price in the order, the extra work and material shall be paid for at actual necessary cost as determined by the contracting officer, plus 10 percent for superintendence, general expense, and profit. The actual necessary cost will include all expenditures for material, labor (including compensation insurance), and supplies furnished by the con-

tractor, and a reasonable allowance for the use of his plant and equipment, where required, to be agreed upon in writing before the work is begun, but will in no case include any allowance for office expenses, general superintendence, or other general expenses.

#### APPENDIX B

The findings and decision of the Contracting Officer and the Head of the Department with respect to Claim No. 17 are as follows:

#### ~~CONTRACTING OFFICER'S FINDINGS AND DECISION~~

"Claim for payment of material removed from Borrow Pit No. 2 at actual cost as provided in form B Order for Changes No. 3."

Amount claimed	In	Date
Not stated	Letter to Construction Engineer— Exhibit 20A	Dec. 16, 1939
Not stated	Statement of claim—Exhibit 1	Jan. 24, 1940
Not stated	Statement of claim—Exhibit 2	Mar. 25, 1940
\$181,721.10	Statement of claim—Exhibit 4	Feb. 16, 1942
\$181,721.10	Release on contract—Exhibit 5	Mar. 14, 1942
\$204,720.49	Letter to Chief Engineer—Exhibit 20	June 23, 1942

#### FINDINGS OF FACT

1. This item of the claim is a request for payment, at \$0.35 per cubic yard, for material excavated in 1939 and, at cost plus 10 percent, for material excavated in 1940 from borrow pit No. 2. Payment has been made, under item 14 of the schedule, for the material in question. The amount claimed in the above statements is in addition to previous payments, and the amount stated in the release on contract is arrived at as follows:



## Excavation during 1939

Claimed—79,847 cu. yds., at \$0.35.....	\$ 27,946.45
Paid—79,847 cu. yds., at \$0.23.....	18,364.81

Balance claimed by contractor.....	\$ 9,581.64
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## Excavation during 1940

Claimed—Cost plus 10 percent.....	\$366,924.39
Paid—846,891 cu. yds., at \$0.23.....	194,784.93

Balance claimed by contractor.....	172,139.46
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Total claimed by contractor.....	\$181,721.10
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The contractor's letter of June 23, 1942 (exhibit 20), was filed after the release on contract was executed and revised the supporting data for Item No. 17 of the claim, increasing the claim by \$22,999.39.

2. This item of the claim has been the subject of numerous conferences and much correspondence. The first protest in connection with this item was in a letter to the Construction Engineer dated December 16, 1939, in which the contractor's chief clerk protested the November 1939 estimate, one of the reasons being:

".... We have moved a considerable amount of cobble borrow, yet no cobble borrow was paid on our estimate, ....."

A copy of this letter is attached and marked "Exhibit 20A." As a result of the conferences with the contractor, it was concluded that the contractor's claim should be given further consideration.

3. Paragraph 52 of specifications No. 705 provides that materials for the embankment shall be taken from required excavation for the dam or from borrow pits as designated by

the contracting officer. The specifications provide for the location and extent of borrow pits as follows:

“..... The location and extent of all borrow pits shall be as directed by the contracting officer, and the Government reserves the right to change the location of such borrow pits or to locate additional borrow pits as required, but such pits will be located as close as feasible to the work in which the borrowed materials are to be used. ....”

Borrow pit No. 1 was located by the Construction Engineer on the right or north side of the Pine River within the area designated as “earth embankment borrow pit area” on drawing No. 191-D-45, which is included in specifications No. 705. The materials encountered in this borrow area were generally satisfactory for use in the earth-fill portion of the embankment with very little separation of cobbles. When borrow pit No. 1 was exhausted as a source of embankment material, another borrow area, designated as “Borrow Pit No. 2,” was located by the Construction Engineer on the left or south bank of the Pine River, partly within the borrow-pit area shown on the south side of the river by drawing No. 191-D-45, and marked as “earth embankment borrow pit area.” The materials from some parts of borrow pit No. 2 contained a much higher percentage of cobbles in excess of 5-inch diameter than did the material from

borrow pit No. 1. The contractor protested the requirements for separation of cobbles and claimed payment for all materials taken from borrow pit No. 2 as excavation and separation of excavation in borrow pits under item 16 of the schedule of specifications. The contracting officer could not agree to this asserted claim for payment under item 16 of the schedule. The contracting officer did, however, recognize the following considerations:

(a) That borrow pit No. 2 was located, in part, off the area designated as a borrow-pit area on drawing No. 191-D-45.

(b) That a considerable percentage of cobbles occurred in borrow pit No. 2, requiring expensive separation operations to meet the specification requirements.

(c) That the use of materials from borrow pit No. 2 resulted in the production of enough cobbles for most of the cobble fill required on the downstream face of the dam and eliminated the need for a cobble borrow pit. The foregoing considerations were found to be a basis for an adjustment in the price for excavation from borrow pit No. 2 and negotiations were entered into for an agreement with the contractor for such adjustment.

4. During the course of the negotiations, several alternative settlements were proposed to the contractor, none of which were agreed to. When it became apparent that an agreement could not be reached, order for changes No. 3 (exhibit 21), in the form prescribed in

those cases where no agreement as to adjustment of compensation can be secured with the contractor, was recommended to the Commissioner for approval on August 31, 1940. The approved order was transmitted to the contractor on October 7, 1940. On December 28, 1940, the contractor presented its claim under order for changes No. 3. This claim was subsequently revised several times and, on April 8, 1941, was presented as supporting data for item No. 17 of the claim and used in the contractor's statement of claim dated February 16, 1942 (exhibit 4). Copies of the contractor's letter of April 8, 1941, and the summary sheets for the supporting data are attached and marked "Exhibit 22." The hours of labor and rates of pay for the contractor's employees, the equipment used and the hours of use, and the cost of materials as set out in the claim were all checked and found to be substantially the same as shown by the records kept by the Government. The minor exceptions to these items are set out in the tabulation in paragraph 6 hereof. The equipment rental rates as submitted by the contractor were found to be excessive, as is discussed in the following paragraphs of these findings.

5. Although the contractor's presentation of claim was, in all submissions, on the basis of claimed actual cost plus 10 percent for all operations involved in excavation, separation, and transportation to the embankment of all materials removed from borrow pit No. 2, the con-



tracting officer recognized that an equitable adjustment would entitle the contractor only to the cost of the separation operations as an additional payment. However, it was found difficult to segregate costs of separation from those of excavation and transportation, and it was therefore agreed that the adjustment of compensation should be made on the basis of actual cost of all operations plus 10 percent. In the consideration of these costs as claimed, it was found, as stated in paragraph 4 above, that the rates stated for all items of the claim except the rental rates for equipment in use could be agreed upon. Attached and marked "Exhibit 23A" is a comparison of the equipment rental rates as claimed by the contractor and as determined by the contracting officer and as used in computing the allowances under the proposed "Adjustment of Compensation" under order for changes No. 3.

6. On July 29, 1941, an "Adjustment of Compensation" was mailed to the contractor. The contractor has never accepted the proposed adjustment and the matter of adjustment of price for excavation in borrow pit No. 2 is now in the status of a claim. A copy of this proposed adjustment is attached and marked "Exhibit 23." Following is a summarized statement of the costs plus 10 percent for operations during 1940, as claimed by the contractor and as determined by the contracting officer:

Item	Description	Contractor's claim	Contracting officer's determination
1	Labor (excavation, transportation, and separation of materials).....	\$ 53,649.78	\$ 52,897.78
2	Labor (moving, remodeling, and erecting screening plant).....	—	9,583.85
3	Compensation insurance, public liability, and taxes.....	5,368.66	6,236.82
4	Equipment rental and operating allowance.....	274,454.60	145,230.07
5	Materials (explosives).....	94.59	94.59
6	10 percent for superintendence, general expense, and profit.....	33,356.76	21,144.97
	Total due contractor.....	\$366,924.39	\$235,185.78
	Amount paid to contractor— 857,671 cu. yds., at \$0.23.....	194,784.93	194,784.93
	Balance due contractor.....	\$172,139.46	\$ 40,400.15

Exceptions by the contracting officer to the contractor's statement are as follows:

Item 1.—The contractor claimed \$755.00 for operating rollers on the fill. This is properly a part of placing operations and, having been allowed in the payments under item 19 of the schedule of specifications No. 705, no additional allowance can be made for roller operation.

Item 2.—The contractor originally included this item in the plant valuation. It properly belongs in the labor costs and was so included as allowable labor costs in the contracting officer's determination.

Item 3.—This difference is due to the changes consequent to the determination of allowable labor costs as noted under items 1 and 2 above.

Item 4.—Rates used by the contractor apparently are hourly rates for all equipment.

In the contracting officer's determination, the rates used are in accordance with the Bureau's standard schedule of equipment rental rates dated January 2, 1940, and are on the basis of two-shift-per-day rates except in the case of the light plants where one-shift-per-day rates are used.

Item 5.—No exceptions.

Item 6.—The contractor included item 3 in the total used for calculating the 10 percent for profit. In the contracting officer's determination, item 3 was omitted in computing the 10 percent for superintendence, general expense, and profit.

7. The contractor's letter of June 23, 1942 (exhibit 20), revising the supporting data for item No. 17 of the claim and increasing the amount of the claim, contains the following statement:

“ . . . These revisions were necessary because costs of moving the plant and adapting it to borrow pit No. 2 were erroneously included as a capital charge whereas it was and should have been handled as a direct charge against the operation in that borrow pit. Also the rental or depreciation rate was based on the original cost of the screening plant only and did not include reinforcing and remodeling costs which were necessary before the

plant functioned as an economical unit.

.. ."

The "Adjustment of Compensation" included the costs of moving, erecting, and remodeling the plant as a direct labor charge. However, it is noted that in taking this labor out of the capital valuation the contractor failed to change the total charge for the use and depreciation of the plant. The contractor has increased the hours of work for some of the equipment and added items of equipment to this later submission of claim. In view of the many changes made in this later submission, and because items of the earlier statement of claim were checked by the contracting officer and found essentially correct, except for equipment rental rates, the revised figures submitted have been disregarded.

8. As set forth in the foregoing paragraphs, the major items remaining in controversy are the basis for equipment rental rates and the basis for allowance for work done in 1939. The other items of the statement of the contractor's costs have been accepted by the contracting officer with a few minor exceptions. The equipment rental rates as used in the "Adjustment of Compensation" are rates established as standard by the Bureau's equipment rental schedule and have been accepted by other contractors as equitable in payment of



extra work at cost plus. They are, in fact, higher than rates for some equipment used on War Department projects for similar work. It is, therefore, found that the proposed adjustment has allowed reasonable rates for equipment rental. The allowance for the work done in 1939 was made by the contracting officer on the basis of the unit costs of the work done in 1940 in the same area, for which records were kept. The contractor has submitted no supporting data to justify the unit price of \$0.35 per cubic yard as claimed for the work done during 1939. It is, therefore, found that the adjustment of compensation based on the unit costs of work during the 1940 season in the same area as determined by the contracting officer constitutes an equitable adjustment for the work done during 1939.

#### SUMMARY OF FINDINGS

9. From the foregoing statements of fact, the following summary of findings is made:

(a) The contractor is entitled to an equitable adjustment of compensation for this item of the claim.

(b) The contractor's supporting data of April 8, 1941, were checked, found correct with exceptions herein noted, and were accepted as to hours of labor and rates of pay for labor, materials used, and equipment used

and hours of such use except for roller used on the embankment. The rates of pay for equipment rental were not accepted.

(c) The equipment rental rates used by the Government in determining the "Adjustment of Compensation" are based on eight-hour-shift rental rates, rather than hourly rental rates as used by the contractor. These eight-hour-shift rental rates are accepted by other contractors in payment for extra work and are found to be equitable rates for the work in question.

(d) The allowance for work done in 1939 is based on the unit cost as determined in the "Adjustment of Compensation" for work done in the same area in 1940, and it is found that this is an equitable basis for payment.

#### DECISION OF THE CONTRACTING OFFICER

10. After a careful review of all the facts and circumstances in connection with this item of the claim, it is the conclusion of the contracting officer that the proposed "Adjustment of Compensation" which has been heretofore offered the contractor is a just and equitable settlement of this item of the claim, and it is found that additional payment should be made to the contractor in the amount of \$44,208.85, as determined in the above-referred-to "Adjustment of Compensation."

## DEPARTMENT HEAD'S FINDINGS AND DECISION

"Claim for payment of material removed from Borrow Pit No. 2 at actual cost as provided in Form B Order for Changes No. 3."

Borrow Pit No. 2, located partly within the area designated on Drawing 191-D-45 as "earth embankment borrow pit area," contained a large percentage of cobbles, requiring expensive separation operations to meet the specification requirements. Excavation and separation of materials in this area resulted in production of enough cobbles to eliminate the need for opening a cobble borrow pit, as provided for in the specifications. The contracting officer found the above facts basis for making an equitable adjustment of the contract price. Finding it impossible to reach an agreement with the contractor regarding such adjustment, the contracting officer issued Order for Changes No. 3 in the form prescribed in those cases where no agreement on price can be reached. By letter dated April 8, 1941, the contractor's claim for work performed in 1940 under the change order, computed on a cost plus 10% basis, was submitted. For material excavated in 1939, the contractor requested payment at the rate of 35¢ per cubic yard, the schedule price for cobble excavation. The total amount claimed in this letter is the figure used in the exception on the release on contract dated March 14, 1942. After the release on contract was executed, the contractor filed a revised statement, increasing the amount

claimed. However, the contractor apparently bases its appeal on the claim set out in the letter of April 8, 1941. In any event, since the release on contract constitutes a full and binding release of the Government's obligations beyond the exceptions made a part of the release, any amount allowed there must be within the exception.

The contracting officer found payment of cost plus 10% to constitute an equitable basis for settlement of the claim for 1940 excavation. The records of the Government and the data contained in the contractor's letter of April 8, 1941, as to the equipment used and hours of use, rates of pay and hours of labor of the contractor's employees, and amount and cost of material used, are substantially in accord. The contractor, on appeal, seriously contests contracting officer's findings only with regard to the equipment rental rates and amounts allowed for maintenance, fuel and lubricants.

The contractor offers no proof to support its claim that the rental rates submitted by it are justifiable. An examination of the record leads to the conclusion that the rental rates as computed by the contracting officer are fair in all particulars, and the contractor's claim for equitable adjustment under Change Order No. 3 should be allowed on that basis. The equipment rental rates used by the contracting officer are those set out in the Equipment Rental Schedule issued by the Bureau of Reclamation on January 2, 1940. The rates in this schedule are based on the Associated Gen-







eral Contractors of America, Inc., report on "Contractors' Equipment Ownership Expense", and take into consideration interest, depreciation, insurance, taxes, storage, equipment overhead, major repairs, general overhauling, painting, and a period of idle time each year for each piece of equipment. The rates have been found fair by the Bureau of Reclamation and by other contractors in the past.

The contracting officer correctly computed rentals on a two-shift per day basis for all equipment with the exception of the light plant, for which rental on a one-shift per day basis was allowed. The equipment, with the exception of the light plant, was used continuously on a two-shift basis on some part of the project. The hourly rates shown in the rental schedule, applicable only when equipment is used for short periods, or intermittently, and intended to compensate for moving and setting up equipment for short-time jobs, cannot be allowed.

A careful check of contracting officer's computations discloses no mathematical errors. The apparent mistake specifically pointed out by the contractor in the computation of allowance for lubricants for the caterpillar tractor is due to a typographical error made in the letter to the contractor dated June 25, 1941 (Exhibit Y, Contractor's Appeal). The total amount allowed is correct. The letter shows an allowance of \$0.01 per horsepower hour for lubricating oil. The figure actually used

by the contracting officer is \$0.001 per horsepower hour.

The maintenance rates and the allowances for fuel, lubricating oil and grease were determined by the contracting officer on the basis of Bureau of Reclamation experience on similar work and the experience and research of other Federal and State agencies. The contractor offers no proof that such rates are unfair in this instance.

Rental rates for the Lima dragline and the screening plant appear to have been properly computed by the contracting officer. The capital value of the dragline after additions were made was used. To determine the rental rate for the dragline, the formula used by the contracting officer is the Associated General Contractors' formula, by which the capital value of the equipment is multiplied by the ownership rate shown in the schedule to arrive at the monthly rate, and this figure divided by thirty, the number of shifts per month, to determine the first shift rate. The same formula was used in determining the rental rate for the screening plant. The depreciation rate used for computing depreciation of the screening plant accords with the depreciation rate shown for heavy duty pit and quarry plants in the Associated General Contractor's report and the Bureau of Reclamation Rental Schedule.

No proof is offered by the contractor to sustain its claim for payment at the rate of 35¢ per cubic yard for material excavated from borrow pit No. 2 in 1939. Allowance made by



the contracting officer of a unit increase over the bid price for earth borrow excavation equal to the unit increase allowed for excavation and separation of material in 1940 appears to constitute an equitable adjustment in price under Change Order No. 3 for excavation in 1939.

The contracting officer's finding that a total of \$44,208.85, in addition to the 23¢ per cubic yard previously paid to the contractor for excavating and separating this material, be allowed the contractor on Claim Item No. 17 is affirmed, and contractor's appeal on this claim dismissed.

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## **APPENDIX C**

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### **IN THE UNITED STATES COURT OF CLAIMS**

**Martin Wunderlich, Ann M. Wunderlich,  
Marie Wunderlich, E. Murielle Wunderlich, and  
Theodore Wunderlich,  
Partnership, Trading Under the Name of  
MARTIN WUNDERLICH COMPANY,**

**v.**

**THE UNITED STATES**

**No. 46307**

**Denver, Colorado,**

**June 11, 1945,**

**Monday, at 10 o'clock a. m.**

### **TESTIMONY FOR PLAINTIFF**

**The parties met, at the time above stated, in  
Room 314, Post Office Building, Denver, Colorado.**

**Present:**

**Hon. Neal L. Thompson, Commissioner;  
George R. Shields and Harry D. Ruddiman,  
Esqs., counsel for plaintiff.  
James J. Sweeney, Esq., counsel for defendant.**

**On order of reference by the Honorable, The  
United States Court of Claims, in the above-en-**



titled cause, testimony on behalf of the plaintiff was taken as follows:

(The reporter was duly sworn.)

**Martin Wunderlich**, a witness produced on behalf of the plaintiff, having first been duly sworn by the Commissioner, was examined, and in answer to interrogatories, testified as follows:

## 2 Direct Examination

By Mr. Shields:

Q. 1. State your name, age, residence and occupation. A. Martin Wunderlich, contractor, and my occupation, of course, is construction work.

Q. 2. Your age and residence? A. My age is 46 and I live at 7 Crestmore Drive, Denver.

Q. 3. Are you one of the plaintiffs in this case? A. Yes, sir.

Q. 4. The plaintiff is alleged to be a partnership. Name the partners in the partnership. A. There is Ted Wunderlich, E. Murielle Wunderlich, Marie Wunderlich, Ann Wunderlich, and myself. I am the managing partner.

Q. 5. How long have you been engaged in the construction business? A. Since 1920.

Q. 6. The matter in litigation here is a structure known as the Vallecito dam on the Pine River in Colorado? A. Yes.

Q. 7. Before taking this dam you had done similar work in other locations, and name some of them. A. I have done some work at Fort Peck

and Augusta, and, of course, I have done a lot of large earth moving jobs throughout different states, namely, Minnesota, Missouri, Iowa, Kansas, Oklahoma, Alabama, Mississippi, Pennsylvania, Colorado and Montana, and some jobs in Illinois and some other states, Wisconsin.

Q. 8. What was the essential character of the work at Vallecito dam? A. Mostly earth moving and earth moving operations.

Q. 9. What was the character of it? A. A contractor.

Q. 10. What was the character of the dam? A. It was an earth fill compacted—earth compacted fill dam.

Q. 11. About the dimensions? A. It is about four thousand feet long and approximately a hundred and fifty feet high.

Q. 12. And contains approximately what yardage of materials? A. Approximately five million yards.

Q. 13. All of which had to be moved and placed in the dam? A. Yes, sir.

Q. 14. State whether or not in advance of bidding on this work you inspected the site and with whom and how and with what result? A. Well, Mr. Leonard and myself went over the site.

Q. 15. Who is Mr. Leonard? A. He is my general superintendent and engineer.

\* \* \* \* \*

9 Q. 40. Had any test pits been made over that area? A. No, sir.

Q. 41. Had test pits been made over the area shown on the right-hand side of the river as borrow pit? A. In the earth embankment borrow pit, but not outside of the lines shown on the drawing.

Q. 42. Why did you think it would be unnecessary to build a pit—

Mr. Sweeney: We pray Your Honor's judgment, he is asking this witness to tell you why Mr. Burns didn't think—

Commissioner Thompson: Yes.

Mr. Shields: Very well.

By Mr. Shields:

Q. 43. Did you eventually prepare and submit a bid for the doing of this work and was your bid successful? A. Yes, sir, we did.

Q. 44. Did you enter into a contract? A. Yes, sir; we did.

Q. 45. I show you a certified copy of the contract and the specifications, which contain the drawing you have been referring to, and ask you if that is the contract you entered into and of what date. (Handing paper to witness.) A. That is the contract entered into the 14th day of March, 1938.

Q. 46. And the attached papers cover the contract specifications and are made a part of that contract? A. Yes, sir.

10 Mr. Shields: I offer the document just identified in evidence as Plaintiff's Exhibit A.

Mr. Sweeney: No objection.

(The document above referred to, marked Plaintiff's Exhibit A, is filed in connection with this case.)

Commissioner Thompson: Before we go any further, is the river right on this little narrow line?

The Witness: Yes, sir.

Commissioner Thompson: And this part is the river?

The Witness: No.

Commissioner Thompson: This is what we call the swampy area?

(Discussion off record.)

By Mr. Shields:

Q. 47. Were you prepared with equipment and otherwise to complete this job in the time you agreed to complete it? A. Yes, sir.

Q. 48. You have already said it was essentially an earth moving job. A. Yes, sir.

Q. 49. What about giving the Court some idea of the extensiveness of the equipment that was necessary to put on the work? A. It was  
11 necessary to put on tractors. I think we had approximately twelve tractors and about six scrapers, two Lima shovels and one is equipped as a dragline and shovel and one of them equipped as a shovel. Then one Lorain shovel, yard and a half; then we had three eight-yard trucks and eight eight-yard Euclid trucks and twelve bottom-dump



twelve-yard Euclid trucks and six end-dump twelve-yard Euclid trucks. Then, of course, we had compressors and flat-bed trucks and pickups and cars, and a large operating plant to separate material, separate rock from the earth.

Q. 50. A screening plant? A. A screening plant and separating plant, and we had rake dozers, bulldozers.

Q. 51. What is a rake dozer? A. A rake dozer is a dozer that was attached to our tractor and it would rake out the rock as it would go over the piles and it would level the piles.

Q. 52. In other words, you could by that machine take rock of a certain size out of the embankment materials? A. Yes, we could.

Q. 53. Was there ever any complaint you didn't have complete and adequate equipment on the job for doing the work properly? A. No, sir.

Q. 54. What about the labor situation? Did you ever have any difficulty in securing your  
12 necessary labor? A. No, sir, we had sufficient labor.

Q. 55. How often were you yourself on the work? How much of your time, would you say? A. Oh, I was frequently on the job. I just don't know how to estimate that, but I would be on the job whenever it was necessary, and, of course, I made frequent trips to the job.

Q. 56. Whether you were there or not, you kept in constant touch with the work? A. I was always

in touch with the work, either by telephone or by reports.

Q. 57. Would you say you were there on an average of one day a week, or more or less? A. Well, yes, I would say I was there on an average of one day a week.

Q. 58. Whom did you employ as superintendent on the job? A. F. H. Stewart was the superintendent.

Q. 59. What would you say as to his competency as a superintendent? A. Well, he is known as one of the best superintendents there is on that type of construction, earth construction.

Q. 60. Who was his assistant? A. Johnny New and Floyd Helm.

Q. 61. State whether or not you, after this job was over, took them with you to Panama, for—

13 Mr. Sweeney: If Your Honor please, we object to what took place after this job. I think it is legal window dressing.

Commissioner Thompson: All right, I will sustain the objection.

By Mr. Shields:

Q. 62. State whether you had been on large earth moving jobs previously. A. Yes, sir.

Q. 63. You knew their competency? A. Yes, sir.

Q. 64. Was there ever any complaint made by the Government representative that either one

lacked in competency or ability on this kind of job? A. No, sir, there wasn't.

Q. 65. State whether in the course of operations numbers of matters of controversy or dispute arose as between you and the construction engineer, representing the contracting officer. A. There did.

Q. 66. What in general was the attitude of Mr. Burns, the construction officer, about giving you written directions to do kinds of work you considered outside of what you were required to do?

Mr. Sweeney: We pray Your Honor's judgment, we object to the form of the question. It  
14 calls for a conclusion. What are the facts?

Were there some complications between them concerning the orders? Let us have the facts.

Commissioner Thompson: So far there isn't any allegation about any fraud or misconduct or anything of that kind. I do not know what the point of the testimony is, but I will overrule the objection for the time being and let him go ahead.

Mr. Sweeney: Exception, if Your Honor please.

A. Mr. Burns refused to give us any written instructions when we asked for them.

By Mr. Shields:

Q. 67. State whether or not you made a protest in all cases where Mr. Burns required you to do work you considered outside the contract requirements. A. Whether?

Q. 68. Whether you protested against doing it.

Commissioner Thompson: What kind of a protest are you talking about, oral or written? A. We did ask for written instructions on it. If there was something we didn't agree with we would ask for written instructions and he would refuse to give it to us.

Commissioner Thompson: You protested orally? Is that right?

The Witness: Yes, sir.

Commissioner Thompson: All right, go ahead.  
15

By Mr. Shields:

Q. 69. State whether or not as a result of all these controversies a large number of claims were asserted by you and whether you had negotiations back and forth over a year or more about the settlement of those claims. A. Yes, sir, we did.

Q. 70. I show you five folders. The first is marked B-1, being a letter with exhibits dated 1-15-40.

Mr. Sweeney: If Your Honor please, my brother is now referring to—

By Mr. Shields:

Q. 71. And a second folder marked B-2, being a letter dated January 24th, 1940, giving details of a number of claims asserted, and a third folder marked B-3, being a letter dated February 29th to the contracting officer, further amplifying the details of the claim, and a fourth folder containing



your letter of March 25th, 1940, with further explanations and pictures explaining claims, and a fifth folder, being correspondence.

Mr. Shields: Now, this you haven't got, Mr. Sweeney.

By Mr. Shields:

Q. 72: Extending from February 8th, 1940; down to October 17th, 1940, being letters received from, or copies of letters sent to, either the construction engineer or the contracting officer, with reference to one of the other of these various claims.

16 It is all the correspondence we could find.

Mr. Sweeney: If Your Honor please, I want to cooperate with my friend in every way possible, but this simply offering generally—

Commissioner Thompson: Let me make this suggestion as to that last exhibit: Mr. Sweeney hasn't seen it.

Mr. Sweeney: I have seen none of these.

(Discussion off record.)

Mr. Sweeney: The first exhibit Brother Shields is offering is a letter which I understand is dated January 15th, 1940, and designated as Plaintiff's Exhibit B-1. I have not seen that letter and it does not appear to be a part of the contracting officer's file, so, obviously,—

Mr. Shields: If you will just bear with me a minute, Mr. Sweeney—

Mr. Sweeney: Yes, parden me, Your Honor.

By Mr. Shields:

Q. 73. I ask you, Mr. Wunderlich, whether all the letters in these five folders purport to be copies of letters written by you or actually written and sent. A. They were either written by me or under my instruction.

Q. 74. And were sent? A. And were sent, yes, sir.

Q. 75. And whether all the copies, or what purport to be copies of letters included in these 17 folders, were copies of letters received from the Reclamation Bureau, either the construction engineer or the contracting officer? A. Yes, sir.

Commissioner Thompson: Let them be filed subject to verification.

Mr. Sweeney: And also subject if Your Honor please, to the qualification that they are self-serving declarations and unsworn statements and obviously will not be binding.

Commissioner Thompson: All right.

Mr. Sweeney: I would like to examine, if Your Honor please, that first document, Exhibit B-1. Obviously this is correspondence between the parties and we are not objecting to the copies because they are all subject to verification.

If Your Honor please, first Exhibit B-1 is apparently a claim submitted by the plaintiff and is dated January 15th, 1940. That evidently was the first submission. Is that correct?

Mr. Shields: Yes.

Mr. Sweeney: I think it is subject to the objection we noted, if Your Honor please.

Commissioner Thompson: All right.

Mr. Sweeney: However, they do appear to have been documents that have been addressed to either the contracting officer or his representative.

18 Mr. Shields: I was preparing to offer them.

Mr. Sweeney: We do not object to the correspondence, if Your Honor please. (Pltf's B-1 to B-5 received.)

By Mr. Shields:

Q. 76. State whether or not you eventually received from the contracting officer his decision on his findings of fact on the various claims you have submitted. A. I did.

Q. 77. I show you this document, certified by the Department of the Interior, and ask you if that is the contracting officer's decision and findings with the supporting exhibits. A. Yes, that is.

Mr. Shields: I offer in evidence Plaintiff's Exhibit C.

Mr. Sweeney: No objection, if Your Honor please. This is a document that has been tendered to the plaintiff by the defendant.

Commissioner Thompson: Let it be received in evidence.

(The document above referred to, marked Plaintiff's Exhibit C, is filed in connection with this case.)

By Mr. Shields:

Q. 78. State whether or not you appealed from the decision of the contracting officer to the Secretary of the Interior. A. Yes, sir.

Q. 79. I show you a document marked Exhibit D and ask you if that is a copy of your appeal to the Secretary of the Interior. A. Yes, sir.

19 Mr. Shields: I offer in evidence Plaintiff's Exhibit D.

(The document above referred to, marked Plaintiff's Exhibit D for Identification, is filed in connection with this case.)

By Mr. Shields:

Q. 80. State whether or not you later received a decision from the Secretary of the Interior on the various claims? A. Yes, sir.

Q. 81. Is the document I hand you, marked E the decision? A. Yes, sir.

Mr. Shields: I offer in evidence Plaintiff's Exhibit E.

(The document above referred to, marked Plaintiff's Exhibit E for Identification, is filed in connection with this case.)

Mr. Sweeney: No objection.

Commissioner Thompson: Let it be received.

(The document above referred to, previously marked Plaintiff's Exhibit E for Identification, is



now received in evidence and filed in connection with this case.)

By Mr. Shields:

Q. 82. I show you a folder marked Plaintiff's Exhibit F, and ask you if that contains one of your copies of all estimates made by the contracting officer covering work done under this contract.

20 A. Yes, sir.

(The document above referred to, marked Plaintiff's Exhibit F, is filed in connection with this case.)

By Mr. Shields:

Q. 83. On the pages opposite the estimates are copies of various letters to the contracting officer, relating to or protesting this or that omission, and ask you if all those letters were written. A. Yes, sir.

Q. 84. And all such letters were received? A. Yes, sir.

Mr. Shields: I offer this document, Plaintiff's Exhibit F.

Mr. Sweeney: May I see it? No objection. These are the monthly vouchers.

Commissioner Thompson: All right, they will be received in evidence.

(The documents above referred to, previously marked Plaintiff's Exhibit F for Identification, is received in evidence and filed in connection with this case.)

By Mr. Shields:

Q. 85. I show you a volume certified by the Department of the Interior as being the Extra Work Orders issued by the contracting officer during the progress of the work and ask you if those were received. Those are the work orders so issued?

21 A. Yes, sir.

Mr. Shields: I offer Plaintiff's Exhibit G in evidence.

Mr. Sweeney: No objection. This also is a document made available by the defendant, Your Honor.

Commissioner Thompson: Let it be received in evidence.

(The document above referred to, marked Plaintiff's Exhibit G, is filed in connection with this case.)

By Mr. Shields:

Q. 86. I show you another folder containing the Change Orders, order of changes, and I will ask you if those were the change orders issued. A. Yes, sir.

Mr. Shields: I offer in evidence Plaintiff's Exhibit H.

Commissioner Thompson: It will be received in evidence.

(The document above referred to, marked Plaintiff's Exhibit H, is filed in connection with this case.)

By Mr. Shields:

Q. 87. State whether or not, Mr. Wunderlich, you have prepared, or caused to be prepared, a folder containing all correspondence you could find pertaining to each separate item of claim named in the Petition. A. I don't just know what you mean by that.

Q. 88. Take claim No. 1, named in the Petition. Does this folder contain whatever correspondence you could find in your files pertaining to that particular claim? A. Yes, sir, it does.

Q. 89. Is that true of folder No. 2, and so forth, corresponding with numbers in the Petition? A. Yes, sir.

Q. 90. State whether or not the letters in each of these folders, the copies of letters in each of these folders, purporting to be written, were actually written and sent as indicated by the copies. A. Yes, sir.

Q. 91. Were the letters, purporting to be the original or copy of the letter received from the contracting officer or his representative, actually received? A. Yes, sir.

Q. 92. Do these folders contain all the correspondence you have been able to locate pertaining to these separate items of claims? A. Yes, sir.

Mr. Shields: I now offer in evidence Plaintiff's folder 1 as Plaintiff's Exhibit 1.

\* \* \* \* \*

27 No. 17, being the correspondence relating to claim 17 of the Petition, appearing—

Commissioner Thompson: 17 on page 14?

Mr. Shields: 17 on page 14 I now offer in evidence as Exhibit No. 17.

(The document above referred to, marked Plaintiff's Exhibit No. 17, is filed in connection with this case.)

Mr. Shields: 17-A. I offer in evidence another folder marked 17-A, which is additional correspondence on the same subject relating to claim 17-A.

Commissioner Thompson: Why is that?

Mr. Shields: 17 is a big item of claim and there is a lot of correspondence.

Commissioner Thompson: This correspondence is directly between the parties?

Mr. Shields: Yes, in all cases.

Commissioner Thompson: All right.

(The document above referred to, marked Plaintiff's Exhibit No. 17-A, is filed in connection with this case.)

\* \* \* \* \*

62 XQ. 225. I am speaking of the spillway.

Just confine your answer to the work you did in connection with the spillway. A. The spillway on the Vallecito dam job was a small part, but the large part is the borrow pits.

XQ. 226. We are only speaking of the spillway. Please just confine your answer to that. A. All right.



XQ. 227. This job you did at Fort Peck, was it at all comparable to the work you did on this job at an elevation of 7500 feet? A. Well, I think the elevation up there, as I remember it, was 3400 feet.

XQ. 228. Where are you speaking of now? A. Fort Peck.

XQ. 229. Fort Peck, yes. A. The Vallecito elevation was higher.

XQ. 230. Seventy-five hundred feet, wasn't it? A. Yes, seventy-six.

XQ. 231. Tell His Honor, please, if it is not a fact construction operations carried on at that high altitude were considerably more difficult than the same kind of work at a lower altitude? A. They are. They are more expensive.

63 XQ. 232. Very much more expensive? A. Yes, sir.

XQ. 233. And at the time you made your bid or gambled on this job, you had had no prior experience of excavating at higher altitudes? A. Oh, yes. Prior to that I excavated at eight thousand feet.

XQ. 234. How about construction operations? You hadn't had any experience in that? A. Yes, sir.

XQ. 235. What construction operations had you actually done? A. We excavated the Idaho Springs job up there about eight thousand feet, between Evergreen and Idaho Springs.

XQ. 236. You said you excavated it, Mr. Wunderlich, is that correct? A. We had to excavate the gravel and culverts and all of the structures on that job.

XQ. 237. Were you a subcontractor? A. No, sir.

XQ. 238. You were the principal contractor? A. I was the principal contractor.

\* \* \* \* \*

88 XQ. 367. Who is Mr. Levy? A. He was the former partner.

XQ. 368. Isn't it a fact he had a half interest in this equipment? A. No, sir, he had no half interest in this stuff at all.

XQ. 369. In none of it? A. No, sir.

XQ. 370. Didn't he bring equipment to the job you leased? A. No, sir. I got some of the equipment that came off the road job.

XQ. 371. When you started this job did you have equipment other than that? A. Yes. These Euclids were all new Euclids, bottom dump Euclids, brand new from the factory.

XQ. 372. You say these were all new? A. That were hauling from this borrow pit, yes, sir.

XQ. 373. When did Dave Levy, of Denver, work for you? A. Our partnership broke up in August of 1938.

XQ. 374. That was the first season you started this job. A. That is right.

XQ. 375. Isn't it a fact you continued using the equipment that Mr. Levy had a half interest in? A. He had no interest at all.

\* \* \* \* \*

99 By Mr. Sweeney:

XQ. 440. We are discussing the job you were going to use this plant on. For your information, these questions relate to the Vallecito dam, in connection with which this screening plant was to be used on.

Commissioner Thompson: I have always tried to be very liberal in cross examination, but go ahead. He did the work; he completed the contract.

Mr. Sweeney: And he is suing the Government for a half million dollars.

Commissioner Thompson: What difference does it make whether he had an engineer or whether he didn't? I don't see the materiality of it at all.

By Mr. Sweeney:

XQ. 441. Now, at this point the various exhibits were offered in connection with your claim. May we ask you, please, are your books and records available for examination in connection with each of the items of the claim? A. Yes, sir.

XQ. 442. Where are those books and records located now? A. Some of them are here and some of them are in Jefferson City.

100 XQ. 443. Would it be convenient for you to assemble all the records relating to this

claim that are either in Jefferson City or Denver?

A. Yes, sir.

XQ. 444. Will they be available for examination?

A. Yes, sir.

XQ. 445. At this point in your examination, in your direct examination, so far as material, you discussed the materials that were placed into Zone 1, or as you called it, Sections 1 and 3 of the embankment. Now, first— A. When I said "Sections," I meant zones.

XQ. 446. Tell His Honor, please, if it isn't a fact No. 1 zone is on the upstream side? A. Yes, sir.

XQ. 447. And that contained a coarse grayelly material and it might contain rocks up to five inches— A. That is right.

XQ. 448. —in diameter? A. Yes, sir.

XQ. 449. And that material required screening to eliminate oversized rocks? A. It required separating.

XQ. 450. And you either use your separating plant or you use the bulldozer with the rake attachment? A. Yes, sir.

\* \* \* \* \*

109 XQ. 490. Now, this equipment you spoke about that was damaged, do you recollect today about how many pieces of that equipment



was damaged in these operations that were involved in Item No. 1? A. It was mostly the Euclids that got the rough part. I think we had something like twelve bottom dump Euclids.

XQ. 491. About how many were damaged on the job? A. All that worked on that particular borrow pit.

XQ. 492. Tell His Honor, please, if it is not a fact that this same equipment has been used by you on other jobs before you used it on this one. A. No, sir. These bottom dump Euclids were new on the job.

XQ. 493. Did you use any second-hand equipment at all? A. Oh, yes.

XQ. 494. You used a lot of it on this particular job? A. Not a lot of it. It wasn't so very second-hand, either. It was good equipment in good condition.

XQ. 495. That is, the time you used it was beginning this job and the second-hand equipment was in good condition? A. It was brand new equipment came to that job in the spring of 1939.

XQ. 496. Was there any reason why you should have used all new equipment on this particular part of the work? A. Because the old equipment couldn't navigate there.

\* \* \* \* \*

251

## CLAIM No. 17

## COBBLESTONE EXCAVATION AND FILL.

## Direct Examination

By Mr. Shields:

Q. 1209. The next item of claim is No. 17, Cobblestone Excavation and Fill. What source of supply for cobble fill was shown on the drawings? A. We were to get our cobbles from required excavation and the balance from the cobble borrow.

Q. 1210. Where was the cobble borrow pit located as delineated on the contract? A. It was located on the left side of the river and the downstream side.

Q. 1211. Downstream from the dam? A. Downstream from the dam.

Q. 1212. Where did you get the cobbles used in this work? A. The cobbles were gotten on the upstream side of the left side of the river, known as No. 2 pit.

Q. 1213. Any from required excavation? A. Yes, and some from required excavation.

Q. 1214. What was this pit finally numbered, this upstream pit labeled "Earth Borrow Pit"? What was it finally numbered? A. No. 2.

Q. 1215. And where was it located? A. On the left side of the river upstream from the dam.

Q. 1216. Whether or not that was a greater or a farther distance from the place the cobbles had to

be placed than the borrow pit shown on the drawings? A. Yes; it was a much longer haul.

Q. 1217. What would you say as to whether the cobbles from this pit had to be hauled 2,500 feet, the limit of the free haul under the contract for hauling of cobbles? A. Yes, it had to be hauled much farther than that.

Q. 1218. Now, give the Court something of the situation as it developed that occasioned  
253 your getting cobbles from what was known as the earth pit instead of the cobble pit shown on the drawings? A. Well, we were ordered to go into No. 2 pit to excavate for earth embankment. And we protested and stated that this wasn't an earth pit borrow, that it was a cobble borrow, that all the earth had been stripped off prior to the start of this excavation.

Q. 1219. When did that taking of the earth occur? A. That occurred in 1938, and this occurred in 1939.

Q. 1220. In Pit 2? A. In borrow pit 2. We went in there in 1938 and excavated and removed the earth that was on the top.

Q. 1221. How thick a layer of earth was on top, would you say? A. Oh, there was approximately anywheres from five to ten feet of earth.

Q. 1222. Did you then or not excavate down to the depth specified by the contracting officer? A. Yes, sir, we excavated down until we hit this cobble borrow—until we hit—

Q. 1223. And did you by that operation get about all of the available materials that would be classed as earth suitable for zone 2 in the dam? A.

254 Yes, sir.

Q. 1224. And what remained in the pit when you completed that operation? A. There remained the cobbles, cobbles and earth.

Q. 1225. Then in 1939, what was required? A. In 1939 the contracting officer asked us to go in there to take out some of this material for cobble embankment and for sections in zone 3, and at that time the contracting officer told us that we would be paid "cobble borrow".

Q. 1226. This was in 1939? A. This was in 1939. We excavated approximately 79,000 yards of cobble and earth material. When we received our estimate we protested and said that we were not paid in accordance with the contract and also in accordance with Mr. Burns' statement.

Q. 1227. Did the estimates for that period include this cobble excavation you made in 1939? A. Yes, sir.

Q. 1228. Did that include pay for the cobbles you excavated in 1939? A. Oh, no, sir, the estimate did not include the payment for cobbles. That only included earth borrow.

Q. 1229. What is the difference between cobble excavation and earth excavation in price? A. The price was twenty-three cents on earth borrow and thirty-five cents on cobble borrow.



255 Q. 1230. While we are on that: What was the occasion for the difference in price?

Why did you in your bidding fix a different price?

A. Because the cobbles had to be separated. They had to go through a separation process and, of course, it was more expensive to excavate cobble material.

Q. 1231. What did you do when you found that you were not being paid as for cobble excavation in 1939? A. We wrote the engineer and protested.

Q. 1232. What did he say about it? A. He said that due to the fact that it was labeled "earth borrow," he couldn't pay us "cobble borrow."

By Commissioner Thompson:

Q. 1233. Who made up these estimates, you or the Government? A. The Government.

By Mr. Shields:

Q. 1234. You have already said that you did not keep an engineer on the work at that time and relied on the Government engineer for the determination of quantities? A. Yes, sir.

Q. 1235. And that was done here? A. Yes, sir.

Q. 1236. Was what was known as Pit 2 eventually or not the pit shown on the drawing on the right-hand side of the river? A. On the left  
256 side of the river.

Q. 1237. I mean on the left side of the river. A. That is right.

Q. 1238. And whether or not this cobble excavation you are now talking about was within the

limits of the area shown on the drawing as that Pit 2 extended? A. The excavation that was made in the fall of 1939 was within the limits of this.

Q. 1239. Now, what happened in 1940? A. That was outside the limits, but inside and outside the limits of the borrow pit.

Q. 1240. Were you not required to extend Pit 2, and if so, in what direction? A. We were required to extend it upstream and also south of the river.

Q. 1241. South would be toward the hills? A. Toward the hills, yes, sir.

Q. 1242. And were those extensions within or without the area specified as Borrow Pit No. 2? A. Those extensions were outside of the Borrow Pit No. 2.

Q. 1243. And therefore was there anything on the drawing that would class the extension here either as an earth or a cobble borrow? A. 257 No, there was nothing on the drawing.

Q. 1244. What would you say was the fact whether the extensions extended into cobble or earth borrow pits? A. The extensions were cobble in that the pits were all cobble that we excavated in 1940.

Q. 1245. Did you get a yard of material out of Pit No. 2 as extended in 1940 that was other than cobble, that is, that didn't have to be separated either on the screening plant or on the embankment? A. No. We separated either through the screening plant or with our rake dozer.

Q. 1246. What did the contracting officer say about paying as for excavation for cobble in 1940?

A. In 1940 he wanted to pay for it as earth borrow and we protested. And in the spring of 1940 he offered to pay us 250,000 yards of cobble. That wasn't satisfactory. And then the rest would be earth. And then later they offered to pay me an adjustment of five cents a yard, and that wasn't satisfactory.

Q. 1247. That is, five cents more than the earth excavation price? A. Yes, sir, five cents more than the earth excavation price.

Q. 1248. Would that have covered all material, or merely cobbles out of the material? A. It would have covered all the materials excavated in the borrow pits. Then I kept protesting and asking for some decision on it and then they submitted a change order wherein they stated that they would pay a certain area cobble borrow, known as Area 1 in Borrow Pit 2. This wasn't acceptable and I again took it up with Mr. Burns and then went to Denver and took it up with the contracting officer and they issued me a B order 3. They gave me a letter stating that they would issue me a B order 3.

Q. 1249. What do you mean by "B order"? The Court wouldn't understand that. A. The B order means that you would go ahead and do the work and that an equitable adjustment would be made after the work was completed.

Q. 1250. Did you threaten to pull out of the pit and refuse to work there?

Mr. Sweeney: Pray Your Honor's judgment. Let the witness testify.

Commissioner Thompson: Yes, it is somewhat leading, but go ahead. A. Yes, I did. I was unable to get any agreement from Mr. Burns and I was unable to get an agreement up at Denver, so I finally went to Denver—I think it was in July of 1940—sometime the latter part of July or the first part of August—and told them that unless I  
259 got an agreement on this material that I would stop all the work, that I could not continue to excavate this pit for earth borrow prices. Then they issued a letter by Mr. Harper wherein he said I would be furnished a B order as soon as it could be prepared. In October of 1940 I received the B order.

By Mr. Shields:

Q. 1251. Was that or not Change Order 3 that is in evidence? A. Yes, sir.

Q. 1252. The change order in evidence appears to be dated in August. How do you account for the fact that the order was thus dated and you did not get it until October? A. I don't know why. I went in several times. I kept going in and asking for it, and finally I got it in October.

Q. 1253. All the correspondence relating to this matter is in evidence as Plaintiff's Exhibit 17?

A. Yes, sir.



Q. 1254. Or, 17-A. What did you understand by the promise under Change Order 3, Form B, of an equitable adjustment after the work was completed? A. That the work would be paid on a cost plus ten per cent.

Q. 1255. In your Petition you claim payment was for the cobble excavation done in 1939 at the contract rate of thirty-five cents for cobble excavation? A. Yes, sir.

Q. 1256. For the work done in 1940, you claim on a cost plus basis. Why the difference between the two years? A. Well, in 1939 the contracting officer said I would be paid under cobble. In 1940—

Q. 1257. Just a moment. With that promise did you or did you not feel it incumbent upon you to keep any record of actual costs for the 1939 excavation? A. No, sir, we did not keep any cost.

Q. 1258. In 1940 you claim on cost plus basis. A. That is, we did not keep any cost of that actual operation there. We have costs of our operations, but we did not keep any costs that—

Q. 1259. Any separate costs? A. Any separate costs, that is right.

Q. 1260. Did you or not keep a true and accurate cost of doing the work as done in 1940? A. Yes, sir.

Mr. Shields: I will defer asking about the costs, other than that they were kept. There are others who are more familiar with how they were kept and the results of such keeping.

By Mr. Shields:

Q. 1261. You did instruct that careful costs be kept of doing the work in 1940? A. Yes, sir.

261 Q. 1262. And to the best of your knowledge—

Mr. Sweeney: Pray Your Honor's judgment, if some other witness is going to testify concerning the costs—

Commissioner Thompson: He can testify to the best of his knowledge as to what was done. Objection overruled.

Mr. Sweeney: All right. We reserve the right to cross examine him.

By Mr. Shields:

Q. 1263. Were you ever paid anything at all in excess of earth excavation for the cobbles you have obtained in the manner you have described from locations other than those described "borrow pit" on the drawings? A. No, sir.

Q. 1264. Whether or not the contracting officer as an equitable adjustment did say you were entitled to something on such account? A. Yes. He found that I was entitled to cost plus ten per cent. But we could not agree on the rental of equipment.

Q. 1265. In other words, you could not agree on what the costs were? A. No, sir. That is, the maintenance of equipment and the rental of equipment was agreed on—I asked—

Q. 1266. Do you remember what amount  
262 he found might be due on account of the  
cobblework? A. He found there was due me  
\$44,000.

Q. 1267. What would you say about that as representing anything approximating your actual costs? A. That is less than one-fourth of my actual costs.

Q. 1268. I believe you stated awhile ago you at one time made certain offers. A. Let us get this straight. That is less than one-fourth of my additional costs over what I have been paid.

Q. 1269. You said awhile ago you had been made some offers. How does this final finding of the contracting officer compare with the previous offers made—five cents a yard additional? A. Oh, the five cents a yard that was offered would be more money. There were approximately 900,000 yards, which would be \$45,000.

Q. 1270. And if you were entitled to only contract price for cobble pit excavation, how would it compare with that? A. With the cobble pit excavation it would compare approximately the same. It would be just approximately the same. That is, after figuring the overhaul.

Q. 1271. The difference between twenty-three cents and thirty-five cents would be twelve cents, wouldn't it? A. Yes, sir.

Q. 1272. And if you got twelve cents additional on all the yardage handled, what would that

263 amount to? A. About \$108,000 or \$110,000.

Q. 1273. Have you already stated what the approximate overhaul was on these cobbles? A. The overhaul would be approximately—it would amount to approximately five or six cents, on the yardage.

Q. 1274. Did you ever get any cobbles from the cobble borrow pits shown on the plans? A. Yes. It was opened up at the end. We did get some that we finished' out with. We used the cobble borrow for earth borrow because it was on the downstream side. We used the cobble borrow for earth borrow to top out the dam.

Q. 1275. Do you know—and if you don't, say so—what the contracting officer's objection was, primarily, to classifying and paying for this material as cobble pit excavation instead of as earth excavation? Did he ever tell you? A. Read your question.

(Last question repeated by the reporter.)

A. Well, it was because it was labeled as borrow.

Q. 1276. Did the haul have anything to do with it? A. Oh, yes. This here was more expensive than the cobble borrow. If I had taken it out of the cobble borrow, it would have been less costly than those, because the haul wouldn't have been nearly as long.

Q. 1277. If this material from Pit 2 would have been classed as cobble borrow, would or would not the material have had to be paid for at the



264 contract price besides the added haul? A.  
Yes.

Mr. Sweeney: Pray Your Honor's judgment, that calls for a conclusion of the witness.

Commissioner Thompson: Yes, that does call for a conclusion.

By Mr. Shields:

Q. 1278. Did you or not have to make any separation of earth materials from the other earth pit? That is, Borrow Pit 1? A. No, sir, we did not have to put that through any separating plant or do any separation excepting for throwing out an occasional rock.

Q. 1279. Did you or not expect earth borrow pit No. 2 to fall in the same category? A. Yes, sir.

Q. 1280. What was the difference between the materials from Pit 1 and Pit 2? A. Pit 1 was earth and was a gravelly material. On top generally there was a layer of red earth with no rock in it to speak of. And it also had some gravelly material with no rock over five inches, except for an occasional rock.

But Borrow Pit 2 had a lot of rock in it and it had a lot of cobbles in it and it had to be put  
265 through a separating plant or separated with rake dozers.

Q. 1281. Are you sufficiently familiar with what you found in Pit 2 to say what percentage of the materials excavated were actual cobbles? A. I tried to get that information from the engineers but I couldn't get it.

Q. 1282. Did you form any opinion of your own knowledge? A. It ran around fifteen per cent of cobbles, fifteen to eighteen cents.

Q. 1283. Were those cobbles all used in the cobble fill of the dam? A. Yes, sir.

Q. 1284. The earth portion of Pit 2 that you said was taken out in 1938: Did that or not contain any excessive amount of cobbles? A. No, sir.

Q. 1285. Are you now making any claim on account of cobbles in that part of Pit 2? A. No, sir.

Mr. Shields: That is all.

#### Cross Examination

By Mr. Sweeney:

XQ. 1286. Mr. Wunderlich, please, isn't it a fact that you obtained all of the cobble material required from Pit 2? Isn't that the sum and substance of the facts relating to this claim?

266 (Last question repeated by the reporter.)

XQ. 1286. (Continued) That is, practically all of it, or enough from Pit 2? A. All the balance that we needed, we got it from Pit 2, yes.

XQ. 1287. Now, if you had obtained the cobbles from the cobble pit indicated on the drawings, you would have had to strip it and build your hauling roads and incur the other expenses that would be usual in connection with that work, wouldn't you? A. If I got it from where?

XQ. 1288. If you had got it from the regular cobble borrow pit. A. Yes, we would have had to strip.

XQ. 1289. And build your haul roads? A. We would also have got paid for stripping it.

XQ. 1290. But you would have had to build your haul roads, and so forth? A. Yes, but we would have had a much shorter haul. That was very material.

XQ. 1291. Now, isn't it a fact that in transporting the materials from Pit 2, that is, the cobbles, that you did not go beyond the free haul limit as

designated in the contract? A. In the cobble  
267 borrow?

XQ. 1292. Yes. Isn't it a fact you did not go beyond the free haul limit? A. When?

XQ. 1293. When you were transporting the cobbles from Borrow Pit No. 2. A. Oh, No. We went way past the free haul limit on Borrow Pit 2, and we went outside of Borrow Pit 2, too.

XQ. 1294. When you did that, did you submit any protest in writing to the contracting officer? I mean, now, Mr. Harper, the contracting officer you have mentioned. A. Yes, in 1940, after the conference, we started protesting in writing.

XQ. 1295. You started protesting in writing then? A. Yes, sir.

XQ. 1296. And you protested to Mr. Harper? A. We protested to Mr. Burns and we sent a copy to Mr. Harper.

XQ. 1297. But you did communicate with Mr. Harper, the contracting officer, on this? A. Yes. We sent a copy of our letters. Mr. Harper instructed us to do that.

XQ. 1298. You were asked if you knew the reasons why the contracting officer said you would be paid cost plus for 1940; do you remember—and that was Mr. Harper, wasn't it? A. Well, 268 they figured that was the most equitable way of handling it.

XQ. 1299. No. I am speaking about the contracting officer now. You are now dealing with Harper. A. We met with Mr. Harper and Mr. Nalder. And when we were ready to submit the bill, then I discussed it with Mr. Nalder and Mr. Harper and Mr. See, and they asked me to submit the bill on a cost plus.

XQ. 1300. Isn't it a fact the substance of this whole claim is that after Mr. Harper, the contracting officer, had agreed to make this equitable adjustment of some \$44,000 plus, whatever that sum is, that you and the contracting officer couldn't get together on the issue as to what was a fair rental for the use of your equipment? A. I asked before I got the change order B3 that we agree on a rental rate and then later they refused to agree on any rental rates. I don't just recall whether it was the late fall of 1940 or the early part of 1941 when we agreed that this should be paid on a cost plus. I again asked that we agree on a rental rate. I tried very hard to get an agreement on a rental rate for this equipment, because we were in agreement on the hours that all the equipment worked.

The only place I could see there would be any confusion would be to agree on the rental rate. The



rates that we had previously agreed upon were not acceptable because they were hourly rates and for small jobs. Then Mr. See told me if I would go back and review the claim and use AGC rental rates I would have no trouble. And I went back and used the AGC rental rates and also what the cost of our maintenance was, and I made it as reasonable as I possibly could, so that there would be no hold-up on this money. And when I submitted it they said it was submitted too high. And, using my maintenance costs, I now find out that I used the maintenance costs below what it actually was actually on the job, and my maintenance costs are below the prices that I submitted.

XQ. 1301. Have you concluded your answer now? A. That's right.

XQ. 1302. Tell His Honor, please, if it isn't a fact that your equipment operated continuously while it was performing this work. A. No. It wasn't used continuously. We were down for rains and like you have on a normal job.

XQ. 1303. Except, of course, for the forces of nature, such as rains and other weather conditions, these seasonal conditions when you couldn't work, but while you were actually performing this excavation work your equipment operated continuously? A. Not on this one job. Not on this one Borrow Pit 2. We would have to move it into Borrow Pit 1 and out of Borrow Pit 2 over to Borrow Pit 1. We would have to move it, back and forth,

270 so as to complete these zones as uniformly as we could.

XQ. 1304. To obtain a proper gradation of materials; that is, the ABC of it, isn't it? A. Yes.

XQ. 1305. You operated on a two-shift basis? A. Yes, sir.

XQ. 1306. You have mentioned the AGC rates. A. Yes; sir, associated general contractors.

XQ. 1307. Do you know as a fact that the Bureau's rates are computed upon the basis of the AGC rates? A. No, they are not. They haven't taken into consideration many things that are in the AGC rates.

XQ. 1308. Will you mention what some of them are? A. Well, they took the monthly rate, the monthly day rate and the monthly night rate, and then divide it into hourly and allowed us on an hourly rate; not taking into consideration loss of time, like monthly rates cover.

Mr. Shields: I shall have to object to further examination along this line. I deliberately left off any direct examination on this because we have other witnesses who have made a special study of this matter and are better prepared to testify.

Mr. Sweeney: He did testify concerning rates.

Commissioner Thompson: Go ahead. He seems to be able to take pretty good care of himself

271 on it.

Mr. Shields: Yes, but I did not have direct examination on it.

Mr. Sweeney: I thought there was sufficient.

A. (Continuing) I haven't got the exact figures, but they divided that by two-thirds, or something like that. I don't have the figures in front of me, and I have had another man figure this and my engineer is in a position to explain this. He has all the figures and the facts.

By Mr. Sweeney:

XQ. 1309. Isn't it a fact that the Government merely was to compute the rates on the 8-hour shift basis and then divide it by the hourly rate—divide it by the hours? A. I haven't checked these figures. My engineer checked it and he will have to answer it for me.

XQ. 1310. All right. So that you can't tell the Court just the basic reasons for the difference between the contracting officer's calculation as compared with your calculation of \$274,454.60? A. I can't, but our engineer and cost man can. He has all the figures.

Mr. Sweeney: I will not question Mr. Wunderlich further on that, Your Honor.

By Mr. Sweeney:

XQ. 1311. Do we understand, please, when you opened up the cobble borrow pit toward the end of the job you did that only for the purpose of obtaining earth fill to finish off the embankment? A. Well, there was no other place we could go and get material. It was the most con-

venient material we could get. It was used for earth fill and the cobbles went into the cobble fill. But by that time the upstream side, Borrow Pit No. 2, had been covered with water and you couldn't excavate there any longer.

XQ. 1312. It was more convenient for you to obtain the material from that particular borrow pit area toward the end of the job? A. Well, that is, the—yes, that was—I wasn't there. I don't know.

Mr. Sweeney: That is all, Your Honor.

Mr. Shields: My friend has been referring to the AGC rental rates, and I think it probative at this time to offer into evidence as Plaintiff's Exhibit 17-B the official schedule of rates as issued by the Associated General Contractors.

Commissioner Thompson: All right, let it be filed.

(The document above referred to, marked Plaintiff's Exhibit 17-B, is filed in connection with this case.)

Mr. Sweeney: What year?

Mr. Shields: 1938, revised and enlarged 1938. I have it marked 17-B.

Also while on that subject and very appropriate to it, the Reclamation Bureau's own schedule of rates as revised in January, 1940, which I have marked 17-C.

Mr. Sweeney: No objection. We would have offered them both, Your Honor.



Commissioner Thompson: Let them both be received in evidence.

(The document above referred to, marked Plaintiff's Exhibit 17-C, is filed in connection with this case.)

By Mr. Sweeney:

XQ. 1313. With respect to 1939, isn't it a fact you did not submit any supporting data to establish the claim for that year? A. What is that?

XQ. 1314. With respect to the cobble material you excavated in 1939, isn't it a fact you did not submit any supporting data for the claim for the work that you did in that year? A. We submitted the amount of yardage moved, which we got from the engineers. Those figures are obtained from the engineers.

XQ. 1315. You checked each of your monthly vouchers, didn't you? You were interested in seeing, of course, you were paid for the work that you did? A. Yes. And when we weren't paid, cobble borrow, why, we went to the engineer and asked him why we weren't paid cobble borrow.

274 XQ. 1316. You were excavating from Pit 2, and it was paid under Item 14 instead of under Item 16, which related to the borrow pit? A. Is this 14 the embankment?

XQ. 1317. The earth embankment. A. Is 14?

XQ. 1318. Twenty-three cents. A. We were paid under earth embankment instead of being paid under Item 16.

XQ. 1318. 16 is the cobble at thirty-five? A. Yes.

XQ. 1319. Item 16 estimated, only a comparatively small amount of cobble, didn't it, 50,000 cubic yards? A. Yes, sir.

XQ. 1320. Whereas you excavated a very large quantity of material from Borrow Pit No. 2, didn't you? A. Yes. But Borrow Pit No. 2 was much more expensive than the cobble borrow for us to move.

XQ. 1321. Why was it more expensive? You were already in it. A. It was a much longer haul.

XQ. 1322. Just for the longer haul? A. Yes. But it had to be processed just the same as cobble borrow. You had to put the material through a separating plant the same as you did cobble. And  
275 this No. 2 pit was three or four times as long a haul and therefore it was a lot more expensive.

XQ. 1323. A lot more expensive than the cobble borrow pit? A. Yes, than the cobble borrow pit.

Mr. Sweeney: That is all, Your Honor.

The Witness: There is one thing I want to explain in there: You said it called for 50,000 yards of cobble borrow. They did not get the amount of cobble out of the required excavation as they had contemplated, and it took a lot more cobble in the cobble embankment than was originally contemplated.

By Mr. Sweeney:

XQ. 1324. All right. How do you know how much the defendant expected to get out of the re-

quired excavation—that is, how much cobble? A. They told me.

XQ. 1325. Who told you? A. The contracting officer.

XQ. 1326. Who was he? A. Mr. Burns.

XQ. 1327. When did he tell you that? A. He told me when we started the job, and as the job went along he said, "We are running short of cobble borrow—running short of cobbles," not "cobble borrow," for the cobble embankments.

276 XQ. 1328. Did you talk to anybody else representing the Government about it besides Mr. Burns? A. Yes.

XQ. 1329. With Jean Walton? A. No. My superintendent did. I did not discuss it with Walton.

Mr. Shields: Just a minute. Change order dated November 14, 1940, recites in its terms that because of failure to secure the expected yield of cobbles from separated cobbles from the required excavations the excavation of separated materials from cobble borrow pit is increased and they specify the amount—which we never agreed to. That covers that.

Mr. Sweeney: The witness volunteered.

The Witness: I did not volunteer. You asked the question.

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**E. H. Stewart**, a witness produced on behalf of the plaintiff, having first been duly sworn by the Commissioner, was examined, and in answer to interrogatories, testified as follows:

**Direct Examination**

**By Mr. Shields:**

**Q. 1.** State your name, age, residence and occupation. **A.** B. H. Stewart, 42 years old. My occupation is superintendent of construction, and my residence is in Denver, Colorado.

**Q. 2.** Whether or not you have any financial interest in the outcome of this litigation? **A.** I have not.

**Q. 3.** Are you now employed by Martin Wunderlich? **A.** No.

**Q. 4.** What has been your construction experience? What had been your construction experience at the time you were employed by Mr. Wunderlich on the dam construction that is now in litigation? **A.** I started in construction work in 1922.

**Q. 5.** Had you been continuously employed in that line of work from then until 1937? **A.** Except at times when I was in the north and in the winter-time we were unable to do that on account of freezing weather.

417 **Q. 6.** Had you prior to this had charge of work comparative with the building of Val-



lecito dam? A. I had been on earth construction ever since 1922 and earthen structures.

Q. 7. How long had you been employed by Wunderlich prior to 1933? A. I started working for him in the latter part of July, in 1937.

Q. 8. When did you go on the work at Vallecito? A. About the middle of the month of May, in 1938.

Q. 9. And were you on it until the completion of the job? A. Not until it was entirely completed, but it was essentially completed when I left.

Q. 10. What assistant superintendents did you have on the job? Who were they? A. Floyd Helm and John New.

\* \* \* \* \*

446 XQ. 170. It is also a fact, is it not, that not all of the materials that you obtained, say, from the borrow pit No. 2, for example, could be placed until you had processed it, that is, until you had screened out the larger rock? A. All of the cobble material from the No. 2 borrow pit was separated.

XQ. 171. Yes, that is a rather expensive proposition, isn't it, separating cobbles? A. Yes.

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## COBBLESTONE EXCAVATION AND FILL.

## Direct Examination

By Mr. Shields:

Q. 597. We take up now Claim No. 17, Cobblestone Excavation and Fill. What required borrow pits were shown on the drawings and in what locations? A. There was one showing on the right of the river on the upstream.

Q. 598. What kind? A. Earth floor of the embankment. And there was one shown on the left bank of the river upstream from the dam.

Q. 599. What kind? A. It was shown on the drawings as earth.

Q. 600. And what else? A. There was one shown downstream from the dam on the left side of the river and it was shown as cobble rock.

Q. 601. Were these the only locations of borrow pits shown on the drawing? A. Yes.

Q. 602. And while we are about it, did you ever get any cobbles from the cobble pit, so-called cobble pit, below the dam? A. No.

Q. 603. What kind of a pit was the earth borrow pit shown on the right-hand side of the  
522 river? A. Earth, clay.

Q. 604. Did you ever get any cobbles from that pit? A. No.

Q. 605. What kind of a pit was that described as an earth borrow material pit on the left bank of

the river, described on the drawings as an earth borrow pit? A. We got some earth out of there and then a lot of cobble also.

Q. 606. What is the fact as to whether you got all the cobbles required in cobble filling on the dam except the quantity you got by separating required excavation made at the dam? A. We got all of the cobbles out of the so-called No. 2 pit with the exception of what was obtained from the required excavation.

Q. 607. About when did you first discover that this so-called earth pit was in fact a cobble pit? A. After moving into it.

Q. 608. What did you do when you found the contracting officer was requiring you to excavate cobbles from a pit described as an earth pit and was paying you as earth excavation from it? A. There was a protest made.

Q. 609. Did you ask written instructions?

Mr. Sweeney: Pray Your Honor's judgment, please; now, what did he do?

Commissioner Thompson: He has the right to ask him if he asked for instructions.

Mr. Sweeney: The question is leading.

Commissioner Thompson: I can't see that that is leading. I think he has a right to ask him that. Go ahead, Mr. Shields.

By Mr. Shields:

Q. 610. Whether or not at that time there was any promise made that the matter would be ad-

justed, that a different price than the earth excavation price would be paid for the cobble materials procured from Pit 2? A. Yes.

Mr. Sweeney: Pray His Honor's judgment.

Commissioner Thompson: I will sustain the objection to that. He can ask him if any promise was made and what it was.

By Mr. Shields:

Q. 611. Yes, whether there was any promise made in 1939 when you were taking cobbles out of what is called an earth pit? A. Yes.

Mr. Sweeney: Pray Your Honor's judgment, we object. What was said?

Commissioner Thompson: I will let him tell what the promise was, if he made a promise. Go  
524 ahead.

By Mr. Shields:

Q. 612. Was there a promise made? A. Yes, we were told we would be paid cobble for it.

Q. 613. Who said that? A. Mr. Burns said that.

Q. 614. Do you know how many cobbles were taken out of Pit 2? What quantity of cobble material came out of Pit 2 during the 1939 operations? A. Approximately 80,000 yards.

Q. 615. Was any part of that paid for as cobble? A. No.

Q. 616. If you know, whether all that material was cobble material? A. There was some earth taken from that pit in 1939.



Q. 617. But is there not the 89,000 you mentioned, the yardage of what you would call cobble materials, distinguished from the earth materials?

A. That came out, yes.

Commissioner Thompson: You mean 80,000?

Mr. Shields: Approximately 80,000. I think it is 79,000.

By Mr. Shields:

Q. 618. Was or not separation of all that approximately 80,000 cubic yards required?

525 A. Yes.

Q. 619. Could any of it be placed on the dam without separation? A. No.

Q. 620. Was earth excavation required to be separated? A. No.

Q. 621. Is any claim being made on account of earth excavation from borrow pit 2? A. No.

Q. 622. Now, coming into the 1940 operations: Was there any change in the situation? A. Well, we separated all of the material from that pit.

Q. 623. Had you by that time discovered that you were not being paid for the cobble material excavated in 1939? A. Yes, that was discovered by one of the estimates.

Q. 624. Did you or not further protest then against the continued excavation of cobbles from a so-called earth pit? A. Yes, we did.

Q. 625. If you know whether the contractor threatened to quit operations unless some adjustment or agreement of adjustment could be had?

Mr. Sweeney: Pray Your Honor's judgment, what did the contractors do? He is the man to say what he did.

Commissioner Thompson: There might  
526 have been a million things that the contractor did. But he has got to pin it down to something or other. Go ahead.

A. Yes, he did.-

By Mr. Shields:

Q. 626. And was some agreement had that there would be an adjustment? A. I understand that there was.

Q. 627. Has there ever been any adjustment, if you know? A. No, not that I know of.

Q. 628. So that as the matter stands, how was the contractor paid for excavation coming from Borrow Pit 2?

Mr. Sweeney: Pray Your Honor's judgment, that is objected to unless this witness knows of his own personal knowledge.

Commissioner Thompson: You can cross examine him all you want on that.

By Mr. Shields:

Q. 629. You saw the monthly estimate, did you not? A. Yes, sir. It was paid as earth borrow.

Q. 630. What is the difference in price between earth borrow excavation and cobble borrow excavation? A. Twelve cents a yard.

Q. 631. One is twenty-three and the other thirty-five? A. Yes.

Q. 632. Whether under your directions a  
527 careful count was kept of the cost of the 1940 operations in Borrow Pit No. 2? A. Yes.

Q. 633. And if the contractor is entitled to that cost, the records will show the amount there? A. Yes.

Q. 634. What is the difference and difficulty between excavating and placing on the embankment of earth materials and cobble materials? A. There is a great lot of difference. It is necessary to load earth borrow from the pits, haul it to the embankment and place it. But with cobble borrow it is necessary to separate it. It is harder loading. And then it is necessary to separate it by some manner of separating plant or rake dozers before placing it. It is a lot harder on equipment, tires.

Q. 635. What was the difference in length of haul between the embankment in Borrow Pit No. 2 and the embankment and what was shown on the drawings as cobble borrow pit? A. Many times four or five times longer from borrow pit 2 than it was to the cobble borrow, as shown on the drawing.

Q. 636. If cobbles had been obtained from the prescribed cobble borrow pit, would there have been any question of overhaul? A. No.

Q. 637. In other words, is the cobble borrow  
528 row pit not within 2500 feet of the place on the embankment where cobbles were required. A. Yes.

Q. 638. And what is the distance from the embankment to the cobble borrow pit 2, approximately? A. Some of our haul ran over a mile.

Q. 639. What would you say is the average hauling distance between cobble borrow pit 2 and the place on the embankment where cobbles went? A. I would say it is over 5,000 feet.

By Commissioner Thompson:

Q. 640. That would be the average? A. Yes, sir.

By Mr. Shields:

Q. 641. What is the fact as to whether the pit shown on the drawing as Pit 2 or as earth pit on the left bank of the river, which is Pit 2, constituted the final limits of borrow pit 2 from which cobbles were obtained? In other words, did you go beyond upstream and much farther away than the pit shown on the drawing? A. We did go outside of the area as shown on the drawing.

~~Q. 642. And was the going farther removed from the dam than the pit shown on the drawing?~~

529 A. Yes.

Q. 643. Take the drawing and indicate by a pencil mark upstream from the so-called earth borrow pit on the left side of the river the approximate extent to which the borrow pit was extended and from which cobbles came. This is Plaintiff's Exhibit A, drawing marked 191-D-45.

The witness will now mark with a red pencil. Here is the earth embankment shown. I want him



to show approximately where the earth embankment was finally extended to upstream from what is shown.

(Conference off the record.)

By Mr. Shields:

Q. 644. You have made a red line indicating something of the extension of the shown borrow pit? A. Yes.

Q. 645. And did all that extension add to the length of haul to the dam? A. Yes.

Q. 646. I show you now a copy of a letter from Mr. Burns, as construction engineer, dated April 27, 1940, the same being sheet 25 of Plaintiff's Exhibit 17, and a preceding map or sketch marked sheet 24, and ask you if the sketch accompanied this letter and was Mr. Burns' instructions as to how this pit on the left side of the river was to be extended in 1940 (papers exhibited to witness). A. Yes.

Q. 647. And were these boundaries conformed to in subsequent excavation or were there variations in them? A. There was a variation.

Q. 648. Does that in general, though, indicate the prolongation upstream of the pit shown on the drawing? A. Yes.

Q. 649. And would this or not better indicate than the markings you have made on Drawing D-45 as to the extensions actually made? A. Yes.

(Conference.)

By Mr. Shields:

Q. 650. Were you ever allowed or paid anything as for cobble overhaul? A. No.

Q. 651. Were you ever allowed or paid anything for these cobbles except as earth excavation? A. No.

Mr. Shields: That is all.

### Cross Examination

By Mr. Sweeney:

XQ. 652. Mr. Stewart, you testified on direct that the material in Borrow Pit 1 didn't have to be separated. Isn't it a fact that all of the material in Borrow Pit No. 2 had to be separated?

531 A. There was some taken out of there in 1939 that was earth and was not separated. It did not contain cobbles.

XQ. 653. The Specifications provide, please, Paragraph 55, only so far as pertinent, subparagraph (c), at Page 84:

"No stones having maximum dimensions of more than five inches shall be placed in the earth-fill portion of the embankment. Should stones of such size be found in otherwise approved earth-fill embankment materials, they shall be removed by the contractor either at the site of excavation or after transporting to the embankment, but prior to rolling and compacting the materials in the embankment. Such stones shall be placed in the cobble-fill portion of the embankment as approved by the contracting officer."

Now, just tell His Honor if it isn't a fact that the stones that were taken from Borrow Pit No. 2—that you used them for the cobble fill in Zone 3 downstream? A. That was the type of material. That was cobble.

XQ. 654. Yes. And it so happened that you found practically all of the cobble material that was necessary in Pit No. 2? A. All the cobbles that was necessary to finish the cobble section of the embankment other than what was required, obtained in the required excavation, came from that borrow pit.

XQ. 655. You have told us about the controversy which developed between the contractor and the Government, that cobbles were being re-  
532 moved from this pit and you felt you had to carry them a long distance, a longer distance than if you obtained them from some other pit. Do you know as a fact if some equitable adjustment had been agreed upon by the contractor or suggested by the contracting officer totaling the amount that has been set out under Item 17 of the claim in the Petition? A. The contractor does not consider that to be equitable.

XQ. 656. But I mean the contracting officer did suggest such a settlement? A. Yes.

XQ. 657. Isn't it a fact that the only controversy now between the parties is as to the fairness of the so-called rental rate? A. Yes, I understand that.

XQ. 658. That is something you are not testifying about? A. Yes.

XQ. 659. Tell His Honor please if it isn't a fact that the work relating to this item of the claim was performed under a continual seasonal program of two shifts per day and seven days per week operation. A. Yes, whenever climatic conditions permitted.

Mr. Sweeney: That is all. Thank you.

533

Redirect Examination

By Mr. Shields:

RDQ. 660. Mr. Stewart, what would you say as to the comparative amount of breakdowns you would have in cobble pit as compared with breakdowns and upkeep in an earth pit? A. In the cobble excavation it would exceed greatly the amount that you would have in an earth borrow pit.

RDQ. 661. And whether any normal rate of depreciation on equipment and upkeep of equipment would apply when equipment was on this kind of work? A. It should not apply on that type of work.

Recross Examination

By Mr. Sweeney:

RXQ. 662. In connection with this last question that Mr. Shields asked you about the comparative amount of the breakdown between excavating cobble from Pit 2 and the cobble borrow pit as indicated on the drawings, tell His Honor please if it isn't a fact that whatever cobbles you encountered in excavating the earth material in Borrow Pit No.



2—what would you have done with the cobbles you encountered in Borrow Pit No. 2 in your excavating operations if you hadn't placed them in Zone 3, or Zone 4? A. Well, that is where we got all of our cobbles for Zone 4 after the required excavation was completed.

RXQ. 663. Isn't it a fact you couldn't get 534 those cobbles unless you excavated whatever material was with them; isn't that a fact? You had to get the earth somewhere, didn't you? Just answer that question. A. We got it out of the cobbles excavated from that pit.

RXQ. 664. And whatever excavation or materials you could not get from required excavation you got it from the borrow pits, didn't you? A. Yes.

RXQ. 665. You got a lot of the material from this No. 2? A. Yes.

RXQ. 666. And when excavating this material you also encountered the cobbles? A. When we was excavating this cobble material we got the earth, yes.

RXQ. 667. Yes, of course. So you dug cobbles and earth, too, didn't you? Now, isn't it a fact that only a very small quantity of cobble was required, that is, as compared with earth excavation? A. There were a lot of cobbles required when we went into that pit.

RXQ. 668. Well, 50,000 from the cobble pit; isn't that a fact? And the remainder, 300,000, or whatever that quantity is, you were to obtain from

other sources? A. I couldn't say what quantity of cobble—

535 RXQ. 669. We will have the contractor provide the schedule. A. I do know that there was a lot of cobble required at the time that the required excavation was completed and the Bureau of Reclamation had sections of the cobble area—of the embankment—at that time—they were aware of the amount of cobbles that it would take to complete No. 4 section of the embankment.

RXQ. 670. Do you recall that Item 16 of the schedule pertaining to excavation and separation of excavation in borrow pits for cobble fill and transportation to the embankment contemplated only 50,000 yards of that material? A. Yes, but the required excavation didn't furnish as much cobble as was anticipated, either.

Mr. Sweeney: That is all.

Redirect Examination

By Mr. Shields:

RDQ. 671. In other words, the estimated quantity of the required cobble pit excavation was 50,000 yards? A. Yes.

RDQ. 672. But the actual excavation had to be correspondingly increased as the expected cobble from required excavation diminished? A. Yes.

\* \* \* \* \*

576 XQ. 889. Isn't it a fact that Borrow Pit No. 2 on the other side of the river contained oversized cobbles and boulders which unless separated by screening would have to be removed by the rock rake dozer and hand-picking after placement? A. No. 2 pit was cobble, yes, and it was necessary to separate.

XQ. 890. But you did not have to separate this material in No. 1, did you? A. No.

XQ. 891. And isn't it a fact that the excavation in Borrow Pit 2 would have required long moves of the excavating equipment between the two pits? A. At that time, No. 2 borrow pit wasn't available to us.

XQ. 892. Wasn't it available at that time? A. No.

\* \* \* \* \*

639 (Witness excused.)

**John New**, a witness produced on behalf of the plaintiff, having first been duly sworn by the Commissioner, was examined, and in answer to interrogatories, testified as follows:

### Direct Examination

By Mr. Shields:

Q. 1. Will you please state your name, age, residence, and occupation, Mr. New? A. John New; La Monte, Missouri; age, 35; present occupation, farming.

640 Q. 2. What connection, if any, did you have with the work of building the Vallecito dam? A. Foreman, general foreman.

Q. 3. When did you go on the work, and how long did you stay? A. I went on the job in July, 1938, and remained until January, 1941.

Q. 4. You state you were general foreman. Did that mean something as assistant to Mr. Stewart, the superintendent? A. Yes, sir.

Q. 5. Did that mean that you were in charge of all of the work, subject to Mr. Stewart's orders? A. All the work in the field.

Q. 6. What experience had you had prior to then, prior to the time you went on this work, in construction work? A. I had been working on construction work since 1929.

Q. 7. What character of jobs had you been connected with? A. Mostly road construction.

Q. 8. Earth moving? A. Yes, sir.

Q. 9. And what would you say about the Vallecito dam contract? What was it, essentially? A. Earth moving.

Q. 10. Were you experienced then in the operation of how to best operate the various types  
641 of earth-moving equipment that was placed on this job? A. Yes, sir.



671

## CLAIM No. 17

## COBBLESTONE EXCAVATION AND FILL

## Direct Examination

By Mr. Shields:

Q. 160. State, if you know, where all cobblestone materials required in the construction of the dam, except those obtained from the required excavation, were obtained. A. They were obtained from borrow pit, what was known as Borrow Pit No. 2.

Q. 161. And if you know, how that borrow pit was denominated or described on the contract drawings? A. It was described as an earth borrow pit.

Q. 162. I want you to look at sheets 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, and sheets 79, 80, 81, 82, 83, 84, 85, 86, and 87, and I ask you if those pictures indicate the kind of materials procured from Borrow Pit No. 2, clay and earth, the borrow pit  
672 on the contract drawings. A. These are pictures of material taken from Borrow Pit 2.

Q. 163. Look at Sheet 73 and tell what the two top pictures show. A. It shows the shovel, where it is loading trucks of material from Borrow Pit No. 2.

Q. 164. Look at the middle picture on Sheet 74. Would the answer be the same? A. Yes, sir.

Q. 165. Look at the middle picture on Sheet 76. Would you say that is— A. That is where the truck is unloading at the separation plant.

Q. 166. What materials? A. No. 2 materials, materials from No. 2 borrow pit.

Q. 167. Take the two pictures on Sheet 78. What does that show? A. That shows pictures of the separation plant. The top picture shows where trucks are loading out from the plant. The lower picture shows cobblestones to which the two go from the floor pile, and were pushed out over a grizzly into the chute on the ground.

Q. 168. Were these later reloaded and placed in the dam? A. Yes, sir.

673 Q. 169. As an experienced earth mover, would you consider the requirement of movement of such material shown on these pictures movement of earth excavation? A. No, sir.

Q. 170. What would you call it? A. I would call it a rock excavation.

Q. 171. Whether or not it was necessary to separate all the excavation done in 1940 from Pit No. 2? A. It was.

Q. 172. You have already said that all the cobbles placed in the dam, except whatever quantity was required for the required excavation, came from the excavation of Pit No. 2, is that correct? A. Yes, sir.

Q. 173. You are familiar with the fact that the contract drawings located a cobble pit below the dam? A. Yes, sir.

Q. 174. What would have been the difference in hauling the cobbles from that pit and in hauling

from Pit No. 2? A. Hauling from Pit No. 2 was four or five times greater than it would have been from the pit that was designated on the plan.

Q. 174. The contract fixed a free haul limit of cobbles of 2500 feet. Was Pit No. 2 within that distance from the embankment? A. It was 674 - reater than that distance.

Q. 175. What would you say was the average distance from Pit No. 2 to the dam where the embankment pits were placed? A. Four or five thousand feet.

Q. 176. Do you know or were you familiar at the time with the fact that this material was classed and paid for as earth excavation, all the materials coming from Pit No. 2? A. I do not know.

Q. 177. As an earth-moving man, would you say it was earth excavation? A. No, sir.

Mr. Shields: That is all.

#### Cross Examination

By Mr. Sweeney:

XQ. 178. Tell His Honor, please, if you know, how much earth was taken out of Pit No. 2. A. I do not know.

XQ. 179. Well, can you give His Honor a rough estimate? Was it about one million or ten million? You were the assistant foreman on this job. You are telling about this item of claim. A. It wasn't my part of the work to check the quantities nor the estimates that came from any pits on the job, so I

do not know how much material was removed from this pit.

675 XQ. 180. How can you testify to know of the things you have on direct as you have, if you don't know those simple facts? A. I do know that we did remove this material from this pit, and the material was processed and placed upon the embankment.

XQ. 181. Now, tell His Honor, please, what is the proportion of earth and cobble, if you know? A. The percentage of cobble run quite high; I would not know just exactly; twenty-five to thirty per cent.

XQ. 182. The record will show not more than ten per cent cobbles, as compared with the other? What would you say? A. In my opinion, it would be low.

XQ. 183. You just told His Honor just a moment ago that you did not keep a check of those things, so, as a matter of fact, you haven't any basis upon which you can even make an estimate? A. I didn't keep a check.

XQ. 183. You didn't keep a record? A. I didn't keep a record, but from observation I could tell pretty near what percent it would run by checking the screened material, going to the plant and checking the material.

XQ. 184. But it is a fact that only a small amount of material from the plant was cobble? A.  
676 There was quite a large amount of cobble.



XQ. 185. Could you suggest about how much?

A. I said twenty to twenty-five per cent.

XQ. 186. Twenty-to twenty-five per cent. That is your best estimate? A. Similar to that.

### Redirect Examination

By Mr. Shields:

RDQ. 187. When you are talking about the percentage of cobbles, you mean cobbles, not cobble inaterial? A. I mean cobbles, yes.

RDQ. 188. What would you say as to whether all the excavation was cobble or earth material? I mean, the per-cent of cobble that was hauled from this—that is, the actual cobbles extracted from the excavation, would amount to something of the percentage you stated? A. Yes, sir.

Mr. Shields: That is all.

Mr. Sweeney: No further questions, if Your Honor please.

\* \* \* \* \*

710 C. V. Howard, a witness produced on behalf of the plaintiff, having first been duly sworn by the Commissioner, was examined, and in answer to interrogatories, testified as follows:

### Direct Examination

By Mr. Ruddiman:

Q. 1. Will you state your name, your age, your residence and your occupation? A. C. V. Howard; 38; St. Louis, Missouri; railroad.

Q. 2. Are you presently employed by the plaintiff in this case? A. No, sir.

Q. 3. Were you employed on the Vallecito dam project? A. Yes, sir, I was.

Q. 4. During what period were you there? A. From April, 1939, to October, 1941.

Q. 5. And what was your position there during that time? A. Timekeeper and cost man.

Q. 6. What did your duties involve? A. Keeping the record of the time of the labor and equipment used on the job, and seeing that they were charged to the various items of the contract.

Q. 7. Will you describe a time book? A. It is a small book with the spaces—a number of sheets in it, and spaces for the names of all the employees, the days of the week, and the hours worked each day, total hours worked and the rate, amount.

Q. 8. And at the top of the time book do you show the particular operation to which the hours are charged? A. In addition to the first sheet, there are also additional sheets in the time book on which the hours on each operation are charged.

Q. 9. Would you have a separate heading for each contract item? A. Yes, sir.

Q. 10. And from time to time would Mr. Stewart order you to keep separate costs on other items? A. Yes, he did.

Q. 11. And were the hours of equipment kept in separate books? A. That was a separate time book,

the same as the labor time book, except that equipment was listed in that time book instead of labor.

Q. 12. The time would be entered each day, is that correct? A. Yes, sir, each shift.

Q. 13. Who would fill in these time books? A. The foreman on the job, and sometimes myself.

Q. 14. Well, would you travel around the job to see the time was being charged to the correct operation? A. Yes, I checked the men and the  
712 equipment on each operation several times each shift. I checked for the foreman to see they were charging the men and the equipment to the right operation.

Q. 15. I show you Plaintiff's Exhibit 2-A and ask you do you know when that was typed up? A. It was typed up on July 12, 1939.

Q. 16. At that time did the pencil figures appear on that sheet? A. Not at the time it was typed.

Q. 17. How did they happen to be added? A. This sheet was equipment Mr. Wunderlich had me have typed—

Q. 18. Did you see it being typed? A. Yes, sir, and Mr. Wunderlich and I took this list of equipment and went to the Bureau of Reclamation office to see Mr. Burns, and Mr. Burns and Mr. Wunderlich went over the rates, the rental to be charged on the various pieces of equipment.

Q. 19. For what purpose? A. For the extra work we had been doing there, doing on the job. As they

agreed upon a rental rate, I entered the rate on the list of equipment.

Q. 20. At the time that list was typed up, was there just an original typed? A. No, there  
713 was three copies.

Q. 21. The original— A. Original and two.

Q. 22. All typed at the same time? A. Yes.

Q. 23. And you filled in the pencil rates that were agreed upon during this conference with Mr. Burns, is that right, on the original and all of the copies? A. The original and both copies.

Q. 24. And did you give one of the copies to Mr. Burns? A. Yes, sir.

Q. 25. I notice that opposite certain of the type-written pieces of equipment no rates are listed, and there is a notation, "Not taken up with Burns. Per M.W." Did that appear on the copy given to Mr. Burns? A. No, sir.

Q. 26. That was added after the conference? A. The notation was added afterwards.

Q. 27. And from there down on the sheet the notation "Notation on original. Be sure and save this sheet for M.W. 12-11-39. C.V.H." Did that notation appear on the copy given to Mr. Burns? A. No, that was put on there 12-11-39.

Q. 28. And from there on down—

By Commssioner Thompson:

Q. 29. Wait a minute. Who put it on there? A. I put this notation on the original.



714

— By Mr. Ruddiman:

Q. 30. Who put this on there? A. This was copied on by James Handy.

Q. 31. Did I understand this was copied at the time along with the original? A. Yes, sir.

Q. 32. And have you looked for the original? A. Yes, sir, I have looked for it but I haven't been able to find it.

Q. 33. Further on down I see the following notation, "Original sent to Denver with B.H.S. for 1-25-40 conference." Did that appear on the copy given to Mr. Burns? A. No, sir.

Q. 34. It was added later? A. That was added later at the time it was taken up for this conference.

Q. 35. On the second line from the top there is the insertion in pencil, "Charles A. Burns for Bureau of Reclamation," and there is the further insertion in pencil "12" after the typewritten word "July." Were those put on the copy given to Mr. Burns? A. Yes, they were.

Q. 36. You have testified you were present at the conference between Mr. Burns and Mr. Wunderlich on July 12. A. That is right.

715 Q. 37. And is it your understanding that these rates were to apply to all extra work? A. All the extra work—

Mr. Sweeney: Pray Your Honor's judgment, we submit it is immaterial what understanding, what

this witness might understand. He was there simply recording something that was taking place.

Commissioner Thompson: Not what his understanding was—what was said.

Mr. Sweeney: Thank you.

A. They had agreed on these rates to be used on the extra work that they were performing on the contract.

By Mr. Ruddiman:

Q. 38. Did Mr. Burns say that? A. Yes, sir.

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763

CLAIM NO. 17

# COBBLESTONE EXCAVATION AND FILL

## Direct Examination

By Mr. Ruddiman:

Q. 331. Did Mr. Stewart instruct you to keep separate costs on excavation in Borrow Pit No. 2 during the year 1940? A. Yes, he did.

Q. 332. I will show you Plaintiff's Exhibit 17-A, which is headed Claim for Adjustment Under Order for Changes No. 3, and I will ask you if you prepared the statement which follows. A. Yes, sir, I did.

Q. 333. I notice here a figure of \$53,649.78 for the Cost of Labor. Where did you obtain that figure? A. That is from the time books and labor on the job.

764 Q. 334. And the Compensation Insurance, Public Liability Insurance and Social Security Taxes show a total of \$5,368.66. Where did you obtain that figure? A. That is insurance and taxes paid on that labor.

Q 335 Next appears a Summary of the Hours for various pieces of equipment. Where did you obtain the figures for those hours? A. That was from the equipment and time books kept on the job.

Q. 336. I notice also that there are figures for the rates on the various pieces of equipment. Will you tell me where you obtained those figures? A. From Mr. Leonard.

Q. 337. I will show you a statement headed "Claim for Adjustment Under Order for Changes No. 3," which appears on Plaintiff's Exhibit 17, beginning at page 86. Did you prepare that statement? A. Yes, sir.

Q. 338. And from what sources? A. From the time books and records on the job.

Mr. Sweeney: From what?

Commissioner Thompson: Speak up.

The Witness: From the time books and records on the job.

Q. 339. Was this prepared before or after the statement you have just testified about? A.  
765 After the other statement, the previous statement.

Q. 340. And was submitted to the Bureau? A. Yes, it was.

Q. 341. I notice that the statement appearing at page 6 of Plaintiff's Exhibit 17 has a figure of \$61,193.72 for labor. I note that this is a larger figure than the figure for labor in the previous statement. Can you explain that? A. Yes. This later figure, the difference, is cost of moving, setting up and remodeling separation plant, which was included in the capital value of the separation plant in the previous statement.

Q. 342. The statement in Plaintiff's Exhibit 17-A? A. That's right.

Q. 343. And in this statement, do I understand that the charge for labor in connection with the dismantling and setting up of the separation plant in Borrow Pit No. 2 was charged directly to cobble borrow cost? A. In this statement it is charged directly to the cobble borrow.

Q. 344. By "this statement," you mean the statement in Exhibit 17? A. That is correct.

Q. 345. I notice that in the statement in Plaintiff's Exhibit 17, the figure for Compensation Insurance, Public Liability Insurance and Social Security Taxes is \$6,112.63, and that this is  
766 somewhat larger than that in the statement in Plaintiff's Exhibit 17-A. Will you explain that? A. That is the increase in the insurance and taxes on the labor on the remodeling the separation plant.

Q. 346. In the statement in Plaintiff's Exhibit 17, I notice that the hours listed for the various pieces of equipment are somewhat larger than the



hours listed for the equipment in the statement in Plaintiff's Exhibit 17-A. Can you explain that? A. That is the equipment hours that were used in the remodeling of the separation plant, moving, setting up and remodeling.

Q. 347. Can you tell me where you obtained the hourly rates for equipment shown in the statement, on page 86 of Plaintiff's Exhibit 17? A. Those were given me by Mr. Leonard.

Mr. Sweeney: Pardon me, I didn't hear that last answer.

Commissioner Thompson: "Given him by Mr. Leonard."

Mr. Ruddiman: That is all on Item 17.

### Cross Examination

By Mr. Sweeney:

XQ. 348. Now, referring to Plaintiff's Exhibit 17, Mr. Howard, did you prepare this statement? A. Yes, sir.

XQ. 349. Where did you prepare it? A. On the job.

767 XQ. 350. And when? A. Prior to the date of this.

XQ. 351. That is, you actually prepared this statement? A. Yes, sir.

XQ. 352. We understood you to tell His Honor at the outset of your cross examination that you had not studied bookkeeping. A. I never studied it in school.

XQ. 353. You never studied it in school? A. That's right.

XQ. 354. And you are not a cost accountant? A. No, sir, not a graduate accountant.

XQ. 355. What railroad was it you worked for? A. Terminal.

XQ. 356. Terminal Railroad? A. Yes.

XQ. 357. A steam railroad? A. Steam and Diesel.

XQ. 358. Where was it located? A. In St. Louis.

XQ. 359. How long had you been employed by that company? A. For about five months.

XQ. 360. Five months? A. That is correct.

XQ. 361. And you were employed as a switchman? A. That's right.

768 XQ. 362. What did you do before that? A. I was a brakeman on the Missouri Pacific.

XQ. 363. How long were you a brakeman? A. For a year.

XQ. 364. More than a year? A. Approximately a year.

XQ. 365. Before that what did you do? A. I worked for Martin Wunderlich.

XQ. 366. Before that time? A. Yes.

XQ. 367. And performed the duties that you have heretofore testified about, including keeping cost records on the job? A. That's right.

XQ. 368. And you went out on the job to collect various data relating to the time that the men had put on the job and the equipment that was operated? A. That's right.

XQ. 369. That is correct? A. Yes.

XQ. 370. You actually prepared this statement, Plaintiff's Exhibit 17? A. Yes, sir.

XQ. 371. Now, referring to Exhibit 17-A that was shown to you, did you prepare that statement, too? A. Yes, sir.

769 XQ. 372. The first item under the heading Equipment Rendered is an RD 8 caterpillar tractor, and the rate is \$7.35. That is the hourly rate? A. That is correct.

XQ. 373. What did you do in calculating that rate? Did you do anything at all? Or, just in a few words, how did you arrive at that figure? A. Those were the rates given me by Mr. Leonard.

XQ. 374. Then you don't know anything about it, how they were worked out? A. Not how they were arrived at.

XQ. 375. Do you know anything about the age of the equipment? A. The age?

XQ. 376. Yes, the age of this particular item. A. There were several tractors included in that item.

XQ. 377. This first one, RD 8 caterpillar— A. There are six or seven tractors.

Commissioner Thompson: Do you know how old they are?

The Witness: I don't know how old each one of them is, no.

By Mr. Ruddiman:

XQ. 378. Do you know the ages of any of this equipment? A. Not definitely.

770 XQ. 379. You don't know what depreciation rates or anything were figured in arriving at this hourly rate? You yourself don't know. You took them from Mr. Léonard? A. I took these rates from Mr. Leonard.

XQ. 380. That is something he will have to tell us about? A. (No response.)

XQ. 381. Do you know that the Rendered Rates as calculated by the Bureau are based upon the Associated General Contractors of America? That these are based upon the 1938 report as revised by the Associated Contractors of America? Do you know that the Bureau rates are based upon the AJC rates of 1938 as revised? A. I don't know that.

XQ. 382. You don't know that? A. No. It says they are, but I don't know.

XQ. 383. You don't know anything about that? A. No.

XQ. 384. Now, you mentioned the cost of figures that you considered in connection with setting up the separation plant, Borrow Pit No. 2, and that it was charged directly to the cobble borrow. Do you recollect when the plant was set up? A. In the spring of 1940.

XQ. 385. That was in the spring of 1940? A. That's right.

771 XQ. 386. You were on the job all the time? A. Yes, sir.

XQ. 387. You saw this plant operating? A. Yes, sir.



XQ. 388. Tell His Honor please if it is not a fact that it did not operate efficiently and properly and had to be practically remodeled and rebuilt by the contractor in 1940. A. We moved it over there and remodeled it in the spring of 1940.

XQ. 389. You did that in 1940? A. That's right.

XQ. 390. You don't know anything about any litigation or anything about that separation plant, Mr. Howard? A. I wasn't involved in it, no.

Mr. Sweeney: That is all, Your Honor.

#### Redirect Examination

By Mr. Ruddiman:

RDQ. 391. I forgot to ask you on direct about the statement,—

Commissioner Thompson: Are you going back to Item 17 now?

Mr. Ruddiman: Yes, Item 17.

By Mr. Ruddiman:

RDQ. 392. —appearing in Plaintiff's Exhibit 17-A which includes a figure of \$94.59 for dynamite and supplies. Will you tell me where you obtained this figure? A. This is the dynamite and supplies that we used out on the job to blast some of the material on that pit. The figures were obtained from the amount paid for that material.

RDQ. 393. It is shown in your books and records? A. Shown there, yes.

RDQ. 394. And that same figure, \$94.59, for dynamite and supplies, appears in the statement beginning at page 86 of Plaintiff's Exhibit 17—  
A. That is for the same material.

RDQ. 395. Just a minute. Was that figure obtained from the same source? A. Yes, sir.

RDQ. 396. In the statement beginning at page 86 of Plaintiff's Exhibit 17, there appears a figure of \$3,836.10 for the material for remodeling and setting up the plant—rate on material. Can you tell me where you obtained that figure? A. That is the material used in remodeling and setting up the plant, as shown by the cost records on the job.

RDQ. 397. Does the statement appearing in Plaintiff's Exhibit 17-A correctly list the cost for labor, as reflected in Plaintiff's records? A. Yes, sir, it does.

RDQ. 398. And for Insurance and Social Security Taxes? A. Yes, sir, it does.

773 RDQ. 399. And does it correctly list the Hours for Equipment Rental as shown by Plaintiff's records? A. Yes, it does.

RDQ. 400. And does it correctly show the cost of Dynamite and Supplies, as shown by plaintiff's records? A. Yes, sir.

Mr. Ruddiman: That is all.

Mr. Sweeney: No cross examination.

\* \* \* \* \*

809 Mr. Ruddiman: Your Honor, I over  
looked introducing an exhibit in connection  
with Claim No. 17, and with your permission I will  
return to Claim 17.

Commissioner Thompson: Very well.

### Redirect Examination

By Mr. Ruddiman:

RDQ. 426. Have you prepared a statement showing the actual cost of maintenance per hour for the various pieces of equipment used on this project during the period April to November, 1940, inclusive? A. Yes, sir.

RDQ. 427. I will show you a statement and ask you whether this is the statement you prepared. A. Yes, it is.

RDQ. 428. I notice at the top, running from left to right, you have listed various items or  
810 classes of equipment. I will ask you whether you have shown the hourly rate for maintenance with respect to each item of equipment? A. Yes, sir.

RDQ. 429. I show you the item headed Lima 31½-yard dragline, and ask you to explain to the Court the figures which follow. A. The first figure of \$1,843.42 is the labor for the period from April to November, 1940, inclusive.

RDQ. 430. From April to November, 1940? A. Yes, sir.

By Mr. Shields:

RDQ. 431. Hours of labor? A. Not the hours of labor, no. That is the dollars, \$1,843.42 is the labor used in maintenance and repairs of this piece of equipment during that period.

By Mr. Ruddiman:

RDQ. 432. Is that labor at the shop? A. Shop labor, that is correct.

RDQ. 433. Is that labor which was charged directly to the Lima three and a half yard dragline? A. Yes, sir, it is.

RDQ. 434. Are your shop records kept in such a way that labor is charged directly to a particular piece of equipment? A. Yes, they are. All labor is charged out to the piece of equipment that  
811 they work on.

RDQ. 435. Will you explain the figures which follow? A. The figure of \$104.83 is the compensation insurance on the labor for that period.

By Commissioner Thompson:

RDQ. 436. On that same dragline? A. The same dragline. And the \$18.43 is the social security insurance on the labor on the dragline; \$55.30 is the unemployment compensation insurance on the



labor on the dragline; the \$2.69 is the public liability insurance on that labor on that dragline.

By Mr. Ruddiman:

RDQ. 437. And what about the figure \$2,024.67?

A. That is the total on the labor and the insurance and taxes on that dragline for that period.

RDQ. 438. The labor is charged directly to that piece of equipment? A. Charged directly to that piece of equipment.

By Commissioner Thompson:

RDQ. 439. Well, now, is that from April 1st? You just said April to November. A. That is during the entire month of April.

RDQ. 440. Inclusive? A. Inclusive.

By Mr. Ruddiman:

RDQ. 441. I notice the next figure, .049 per cent.

What does that represent? A. That is the  
812 percentage used to distribute the shop overhead labor to that piece of equipment, distribute its share of the shop overhead.

RDQ. 442. How is that distributed? A. By the percentage of the total shop labor used—by using the percentage, of which this \$2,024.67 is of the total shop labor.

RDQ. 443. Let me ask you this: Do I understand you to mean that this percentage of .049 is arrived at by dividing that figure \$2,024.67 by the total labor charged directly to all pieces of equipment? A. That is correct. The total shop labor.

RDQ. 444. And what does the next figure, \$770.11 represent? A. That is .049 per cent of the overhead labor that was charged to this piece of equipment.

RDQ. 445. What do you mean by the overhead labor? A. That is the general labor in the shop, which is on all pieces of equipment that could not be charged directly to any one specific piece.

RDQ. 446. And what does the next figure, \$2,794.78, represent? A. That is the total of the labor charged direct to that piece of equipment, plus the overhead labor.

RDQ. 447. Next I see the figure 2,876. What does that represent? A. That is the equipment hours that this piece of equipment worked on the job during that period on all phases of work.

RDQ. 448. On all operations and not just including the cobble borrow? A. That is correct. Total hours of equipment worked on all operations during that period.

RDQ. 449. The next figure is .97. What does that represent? A. That is the rate per hour for maintenance labor, arrived at by dividing the total labor by the equipment hours on the piece of equipment.

RDQ. 450. By "total labor," you mean the figure \$2,794.78? A. That is correct.

RDQ. 451. Dividing that by the hours, 2,876? A. That is correct.

RDQ. 452. Reading down, the next figure is \$8,195.41. What does that represent? A. That is the cost of the repair parts for that period. They were chargeable directly to the Lima dragline.

RDQ. 453. What does the next figure, \$464.17 represent? A. That is the freight on those parts referred to above.

RDQ. 454. And the next figure is \$8,659.58. What does that represent? A. That is the total of 814 the repair parts and the freight.

RDQ. 455. The next figure is \$778.27. Where did you obtain this figure? A. That is the general supplies that were used in the maintenance of the equipment. General supplies, such as acetylene, oxygen, bolts and nuts, that could not be charged directly to any piece of equipment, and was charged out to each item of equipment in accordance with the percentage used to distribute the overhead labor.

RDQ. 456. In accordance with the percentage .049 per cent? A. That is correct.

RDQ. 457. And the next figure, \$9,437.85. What does that represent? A. That is the total cost of the repair parts, supplies and freight.

RDQ. 458. And the next figure, \$3.28. Tell us what that represents. A. That is the rate per hour for repair parts and supplies on this piece of equipment.

RDQ. 459. How do you arrive at that figure? A. By using the total number of hours that that piece of equipment worked during that period.

RDQ. 460. In other words, you divide the figure \$9,437.85 by 2,876 hours, previously referred to?

A. That is correct.

815 RDQ. 461. And what does the last figure and column represent, \$4.25? A. That is the grand total rate for labor, repair parts and supplies for equipment maintenance, maintenance labor, repair parts and supplies.

(Last question and answer read.)

RDQ. 462. Do I understand that the figure \$4.25 represents the total cost of labor for maintenance and the total cost of parts, freight on parts, and supplies used during the period April to November, 1940, inclusive, expressed in an hourly rate? A. That is correct, on that piece of equipment.

By Commissioner Thompson:

RDQ. 463. That is just an addition? A. An addition of the rate per hour for labor, parts and supplies, or per hour for—

By Mr. Shields:

RDQ. 464. In other words, you just added 97 cents and \$3.28 and you get \$4.25? A. That is correct.

By Mr. Ruddiman:

RDQ. 465. Are the other pieces of equipment listed in this statement on the same basis? A. Yes, sir, they are.

816 RDQ. 466. And do the rates at which you arrived reflect the actual cost for labor and



maintenance, labor and parts for maintenance, as shown by plaintiff's cost records? A. Yes, sir.

Mr. Ruddiman: I offer this as Plaintiff's Exhibit 17-D.

Mr. Sweeney: May I examine, if Your Honor please?

Commissioner Thompson: Do you want to reserve your right to object to the introduction later on?

Mr. Sweeney: Yes, Your Honor, please.

Mr. Shields: My associate has to visit the doctor a quarter of twelve.

Commissioner Thompson: We will adjourn until 1:30, then.

(Whereupon, at the hour of 11:30 o'clock a.m., an adjournment was taken until 1:30 o'clock p. m. of the same day.)

#### AFTERNOON SESSION

1:40 o'clock

Mr. Shields: Let the record show that plaintiff has tendered to Government counsel a statement of jobs of work had by this plaintiff prior to the taking of this contract, for such use as he may wish to make of it. We will not offer it in evidence.

Mr. Sweeney: The defendant has no desire, then, to use the document.

Commissioner Thompson: Very well.

Mr. Sweeney: Just before we start, if Your Honor please, in connection with the memorandum that we were discussing, which was  
817 Plaintiff's Exhibit 5-B, pages 5 to 10, may the record show that the memorandum is in evidence as part of the plaintiff's appeal, Plaintiff's Exhibit D, pages 14 to 18, inclusive?

Commissioner Thompson: All right.

Mr. Ruddiman: May I ask one more question?

Commissioner Thompson: Surely.

**C. V. Howard**, resumed the stand for further  
Redirect Examination

By Mr. Ruddiman:

RDQ. 467. In connection with what has been offered as Plaintiff's Exhibit 17-D, I notice that under the heading Euclid 15-yard bottom dump truck, no figure is given. Can you explain that? A. Because the repairs on the 12-yard rear dump and the 15-yard bottom dump were combined and kept together as one figure.

RDQ. 468. Is that because many of the parts are interchangeable? A. Yes, sir, and very similar.

Mr. Ruddiman: That is all.

Recross Examination

By Mr. Sweeney:

RXQ. 469. Mr. Howard, please, referring to Plaintiff's Exhibit 17-D, tell His Honor, did  
818 you prepare this compilation or summary

statement of the maintenance expense? A. Yes, sir.

RXQ. 470. That is, you prepared it in the form that it has been offered in evidence? A. Yes, sir.

RXQ. 471. Where did you prepare it? A. Here in Denver.

RXQ. 472. In Denver? A. Yes.

RXQ. 473. When? A. Just a few days ago.

RXQ. 474. Just a few days ago you prepared it? A. That is correct.

RXQ. 475. And in preparing it what did you use? That is, what did you use in its preparation? A. The shop cost records.

RXQ. 476. Anything else? A. All of these figures are included in the shop cost records. That is all that was necessary.

RXQ. 477. These records are now in Denver, are they? A. Yes, sir.

RXQ. 478. The shop cost records? A. Yes.

RXQ. 479. What Address? A. I beg pardon?

RXQ. 480. What address in Denver?

819 Mr. Shields: In my hotel room. And they will be stored elsewhere. They will be sent to Jefferson City.

By Mr. Ruddiman:

RXQ. 481. Tell His Honor, please, did you prepare this Exhibit 17-D in the Cosmopolitan Hotel? A. Yes, sir.

RXQ. 482. In Room 722 and 723? A. 724, I believe it was.

Commissioner Thompson: Has this paper been offered in evidence?

Mr. Ruddiman: The offer has been made.

Mr. Sweeney: The offer has been made, and we are crossing before it is ruled on. You have made the offer, as I understand.

Mr. Ruddiman: Yes, I have.

Commissioner Thompson: Are you through cross examining?

Mr. Sweeney: No. I am just beginning.

By Mr. Sweeney:

RXQ. 483. None of this data has heretofore been furnished? A. Not that I know of.

RXQ. 484. The first percentage factor, .049 per cent, under the Lima three and a half yard dragline, percentage used to distribute shop overhead labor,

where did you get that percentage factor, 820 please? How did you calculate that? A. That was by dividing the total labor used directly in maintaining the dragline by the total labor used in maintaining all of this equipment.

RXQ. 485. The grand total rate for labor, repair parts and supplies for maintenance and equipment is 4.25. Is that on an hourly basis or daily basis or what? A. A daily basis.

RXQ. 486. And this item of 4.25, is it added to the rental rate or is this computed as a part of the rental rate as applicable to the Lima three and a half yard dragline? A. 4.25 is the rate of maintenance for that piece of equipment.



RXQ. 487. And that would be in addition to the rental rate applicable to that piece of equipment?

A. The rental rate you are speaking about, if that includes repairs, it would not be added to it. If it does not, it would be added to it.

RXQ. 488. That is what we want to know. Is there something included in the amounts you have claimed for the rental equipment? A. This was just figured up in the last few days.

RXQ. 489. Of course, it is applicable only to the maintenance, the cost of maintaining and repairing, is that what it is? A. Yes, the cost of  
821 maintaining these pieces of equipment.

RXQ. 490. Would the purpose of this be to prolong the life of this equipment? Would that be the purpose? A. No, sir. This maintenance is just on any breakage or any minor repairs.

RXQ. 491. That is what I want to develop, if it is on some minor repairs and you are maintaining it in good working order. A. It is just breakage, field repairs made on the job while we were working.

RXQ. 492. Would it include any major replacement parts? A. No, that wouldn't include any major replacement parts.

RXQ. 493. It wouldn't include any major parts? A. No, sir.

RXQ. 494. This includes only the repairs that were made on the job from your own shop on the job? A. Field repairs made on the job.

RXQ. 495. Just the field repairs, that is the better expression. A. Yes.

RXQ. 496. Did anyone assist you to prepare this? A. This statement here?

RXQ. 497. Yes. A. No.

RXQ. 498. Where was it typed? A. By 822 Mrs. Olson, here in Denver.

RXQ. 499. Where? I asked where. A. In the Mack Building.

RXQ. 500. In the Mack Building? A. Yes.

RXQ. 501. So this was not prepared, then, in its entirety, in the Cosmopolitan Hotel? You had to use a very large tabulating machine to prepare this? A. No. It was typed in two sections.

RXQ. 502. In preparing these cost rates, did you use any data compiled by the Associated General Contractors of America? A. This is actual costs; nothing else.

RXQ. 503. This is nothing but actual costs? A. That is correct.

RXQ. 504. And it is just a summary of what your job cost records show, is that true? A. That is correct.

Mr. Sweeney: Your Honor please, we understand now that this is just a summary of the job cost records that this witness has compiled, and for that purpose I don't believe it has any objection to it, that is for the limited purpose that this reflects. But the job cost records show it is subject to check and verification by the defendant's auditors.

823 Commissioner Thompson: All right. It may be filed.

(The document above referred to, marked Plaintiff's Exhibit 17-D, is filed in connection with this case.)

Mr. Ruddiman: Any further questioning?

Mr. Sweeney: That is all.

\* \* \* \* \*

836 **George Leonard**, a witness produced on behalf of the plaintiff, having first been duly sworn by the Commissioner, was examined, and in answer to interrogatories, testified as follows:

#### Direct Examination

By Mr. Ruddiman:

Q. 1. State your name, age, residence and occupation. A. George Leonard, 40, Denver, General Superintendent for Contractor.

Mr. Sweeney: What was the age, please?

The Witness: Forty.

By Mr. Ruddiman:

Q. 2. Are you general superintendent for the plaintiff in this district? A. I am.

Q. 3. How long have you been acting in that capacity? A. I started with them approximately seventeen years ago, and while I was not classified as general superintendent at the time, 837 I was more or less an assistant to Martin Wunderlich at all times.

Q. 4. And you have been with him ever since? A. I have.

Q. 5. Did you take any part in preparing a bid for the Vallecito dam project? A. I did.

Q. 6. And in this connection did you study the specifications and drawings? A. I did.

Q. 7. Did you visit the site? A. I did.

\* \* \* \* \*

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# ITEM 17 OF CLAIM

## Direct Examination (Continued)

By Mr. Ruddiman:

Q. 107. Have you ever had any experience in using the Associated General Contractors' equipment ownership expense schedule? A. I have.

Mr. Ruddiman: This schedule, incidentally, is Plaintiff's Exhibit 17-B.



Commissioner Thompson: Let me see that a minute. Go ahead.

By Mr. Ruddiman:

Q. 108. I notice that beginning at page 4 of this schedule, which is Plaintiff's Exhibit 17-B, there are set up certain rates for various pieces of equipment. Can you tell me whether those rates are monthly rates, daily rates, or hourly rates? A. The last column on the right-hand side of each sheet shows the expenses per working month, expressed in dollars. That is a monthly rate reflecting the ownership expense.

Q. 109. Do these sheets, beginning at page 4 and following, show any daily or hourly rate? A. Yes, sir.

862 Q. 110. Does there appear anywhere in this exhibit anything which mentions a daily or hourly rate? A. Yes, there does.

Q. 111. Will you quote then from it? A. On page 2 in the last paragraph it says, "Monthly rate is not subject to deductions for Sundays or holidays and should be charged for full calendar period elapsing between shipments to and from the job. Since the idle time of equipment is taken care of by a factor in the monthly expense, no such factor should be used in computing a daily rate. The daily rate is derived simply by dividing the monthly rate by thirty. When a machine is charged to a job on a daily basis, the rate should be charged for each calendar day without deductions for Sundays, holi-

days or other idle time during the period it is assigned to the job. The period to be charged is the full time elapsing between shipment to and from the job."

That indicates that it would be possible to obtain a daily rate by dividing the monthly rate by thirty, but that the daily rate so obtained should be used for every day in which the equipment is assigned to a particular job or operation and, in effect, you would get back to the monthly rate when you do so.

Q. 112. Do you mean it would have to be assigned every day whether the equipment was idle due to rain or breakdowns? A. That's right. The daily rate would have to be applied to every day  
863 between shipment to and from the job, or moving to and from the job.

Q. 113. I wish to call your attention to a letter dated June 16, 1941, beginning at page 79 of Plaintiff's Exhibit 17, and headed, "Adjustment of Compensation." This letter purports to be addressed to the Martin Wunderlich Company, and is to be signed by S. O. Harper, the contracting officer. Did the plaintiff receive this letter? A. We did.

Q. 114. I notice certain enclosures which follow at pages 82 and 84. Were those enclosures received with that letter? A. Yes, they were.

Q. 115. On page 84 there is the heading, "Allowance for Use of Equipment and Operating Expense, Contract No. 12-R-8413—Order for Changes No. 3."

This lists various pieces of equipment and among other things shows a rate per hour. Can you tell from that exhibit how the Bureau computed their rate per hour for the various pieces of equipment?

A. No, sir. It wouldn't be possible to tell how they computed the rate per hour from this.

Mr. Sweeney: What is that exhibit number, please?

Mr. Ruddiman: That is Exhibit 17. The letter begins it.

Mr. Sweeney: Pages 82 and 84.

Mr. Ruddiman: I believe that is right.

864 By Mr. Ruddiman:

Q. 116. I will show you a letter dated June 25, 1941, purporting to be sent by S. L. Harper to the Martin Wunderlich Company, and appearing at page 70 of Plaintiff's Exhibit 17, and ask whether you received this letter? A. We did.

Q. 117. This letter states, "There is enclosed a tabulation showing in detail the basis for the determination in connection with the order for changes No. 3." Do sheets 71, 72, 73, 74, 75, 76 and 77 constitute the enclosure referred to in that letter? A. They do.

Q. 118. I will direct your attention to the item of equipment, Caterpillar Tractor Model RD 8, 95 Horsepower, appearing at page 71 of this tabulation, and I will ask you to tell the Court how the Bureau has computed the hourly rate for that particular piece of equipment. A. The Bureau has ar-

rived at a monthly rate for an ownership operation by multiplying the capital value of \$7,905 by the per cent of ownership expense per month, which they have obtained from the Associated General Contractors' schedule. That per cent does not show on this schedule, but they have done that and arrived at a monthly rate, and the monthly rate was in turn divided by 30 to arrive at the first shift rental rate of \$15.40 per shift for one caterpillar tractor.

Q. 119. And what is the next step? A. They have taken this 50 per cent of the first shift rental rate for a figure of \$7.70 as the second shift rental rate, to arrive at a total of \$23.10 for a rental rate for a caterpillar tractor for one day, on a two-shift operation.

Q. 120. And what is the next step taken? A. To that they have added a maintenance expense figure at 5 per cent of \$4.60 times 16 hours for the day for a total maintenance expense figure for 16 hours; that is, for a two-shift operation, of \$3.68.

The next item is Fuel, which they have taken at 4.7 gallons, and they have a factor at 7 cents a gallon for 33 cents an hour times 16 hours for the two-shift operation, or a total of \$5.25 for fuel for the 16 hours. To that has been added a figure of \$1.12 for lubricating oil and \$1.76 for grease, both of those figures being for 16 hours of operation. And they arrive at a total of \$34.94 as a figure for rental, plus maintenance, plus fuel and lubricants, for



a daily rate on a two-shift or 16-hour basis. They have divided that daily rate for a two-shift operation by 16 to arrive at a supposed hourly rate of \$2.18.

Q. 121. Is this hourly rate of \$2.18 which you have just described the rate which is used in defendant's proposed adjustment for compensation appearing at page 84 of Plaintiff's Exhibit 866 17? A. It is intended to be, but they have used a figure of \$2.19 instead of \$2.18. It would be very easy by dropping or picking up fractions to account for the cent difference.

Q. 122. To how many hours does that rate apply? A. They have applied it to two items. One, 80 hours of operation, and another, 5,266½ hours of operation.

Q. 123. And what do these hours represent? A. The hours are hours of operation taken from the bill which we submitted to them for compensation under order for changes No. 3, and instead of using the rate as submitted by us, they have taken the \$2.19 rate, computed as we have described.

Q. 124. Do I understand the total hours to which the rate of \$2.19 is applied represents operational hours? A. Yes. The \$2.19 is applied only to the actual hours of operation. In other words, the hours when the equipment was actually operating in the work covered by order for changes No. 3.

Q. 125. Is this in accordance with the AGC schedule? A. Absolutely not. The AGC schedule pro-

vides that their rate must be applied for every day, their monthly rate for every month, and if you arrive at a daily rate, then it must be applied for every day that the equipment is assigned to that particular project or operation. And that has not been done in this case, so that they have a figure a great deal less than the AGC rental rate would reach if properly computed.

867 Q. 126. Do I understand that if the rate of \$2.19 is applied to operational hours, no account is taken for idle time to do weather repairs? A. That's right. The operational hours do not make any allowance of time when the equipment was down for weather or for repairs or for any other reason during the time it was on this particular operation.

Q. 127. Have you prepared a statement showing the application of AGC rentals to actual hours of operation? A. I have.

Q. 128. Is this the statement which you have so prepared (hands to witness)? A. Yes, sir, the statement marked 17-E is the statement prepared by me.

Q. 129. Let us take one piece of equipment and have you explain what you have done with that particular piece. I will refer you to the Lima dragline, the first piece of equipment listed in the left-hand column. A. The first column shows the item of equipment in question, in this case, the Lima dragline; the next column to the right shows a figure of \$39,189 for capital value.

Q. 130. Where is that obtained? A. In order to eliminate any possible dispute as to the capital value, I have used the capital value of \$39,189, which was the figure obtained from the Bureau of Reclamation.

The next column shows the approximate per cent of capital value per month, which should be charged as representing a fair figure for the monthly ownership expense. That per cent figure was also obtained from the Bureau of Reclamation. In the item of equipment in question, namely, the Lima dragline, the figure is 5.2 per cent. As a matter of fact, the AGC schedule for the largest dragline listed, I believe, shows a monthly expense of six per cent of the capital value per month, but here again I have accepted the Bureau of Reclamation figures so as to avoid the possibility of any dispute over minor items.

The next column shows the number of that particular item of equipment which were in use on the Vallecito dam project the period April to November, inclusive, 1940. In this particular case it was one.

Q. 131. Just one dragline? A. One dragline of this particular type.

The next column shows the time which the various items of equipment were used during 1940, expressed in months. In this particular case there was one machine used for eight months on an ownership basis, and for six months on an ownership basis.

Q. 132. You mean, used for eight months or six months on all operations, not just on cobble borrow? A. That is correct. This statement covers all operations of these items of equipment on the Vallecito dam project for the period April to November, inclusive, 1940.

The next column shows the rate per month for the first shift and also for the second shift operation. This rate per month, as in accordance with the AGC schedule, is arrived at by multiplying the capital value by the per cent of capital value which should be charged for actual ownership expense for the month.

Q. 133. In other words, you multiplied \$39,189 by 5.2 per cent to obtain the monthly rate for ownership? A. That is right. The figure in this case is \$2,037.83, which agrees exactly with the monthly rate allowed by the Bureau of Reclamation. That is, not allowed by the Bureau of Reclamation, but computed by the Bureau of Reclamation as being the proper figure to allow for one month's use of the machine on an ownership operation.

Q. 134. How about the figure \$1,018.91? A. That figure is approximately one-half of the first shift monthly rental rate, and is the method indicated or shown in the Associated General Contractors' schedule as being the proper way to arrive at a second shift rental rate.

Q. 135. The next column is headed Total Rental For Year. Will you explain the figures in this



column? A. The next column shows the total rental which should be allowed according to the Associated General Contractors' schedule for the use of this particular machine for the period in question. The eight months on an ownership shift basis is multiplied by the \$2,037.83, the first shift monthly rental rate, to arrive at a figure of \$16,302.64. The number of second shift months of operation, namely, six for this particular machine for the year, is multiplied by the second shift monthly expense rate of \$1,018.91, to arrive at the second shift rental of \$6,113.46. The total of the two items for the first shift and second shift rental, respectively, \$16,302.64 and \$6,113.46, is added to obtain the figure of \$22,416.10, which is the total rental which should be allowed for the operation of this machine for the period in question for the year 1940.

Commissioner Thompson: This is eight months?

The Witness: Eight months for one shift and six months for the second shift.

By Mr. Ruddiman:

Q. 136. The next column is headed Hours Worked in 1940. A. That column shows the total number of hours which this particular piece of equipment worked on all operations on the Vallecito dam project for the period April to November, inclusive, 1940, and it is precisely the same period for which the rental of \$22,416.10 should be allowed, in com-

871      pliance with the AGC ownership and expense schedule.

Mr. Ruddiman: Will you please read that last answer?

(Last answer repeated by the reporter)

By Mr. Ruddiman:

Q. 137. Can this figure of 2,876 hours be checked against Plaintiff's equipment records? A. It can. The figure was obtained by me from our records of equipment operation for the project for the period in question.

Q. 138. And that represents all hours worked during the period in question, and not just hours on the cobble borrow? A. That represents all hours for all operations.

Q. 139. The next column is headed Hourly Rate. Beneath that appears the figure \$7.79. Will you tell us how that figure is obtained? A. That figure is obtained by dividing the total rental due this machine for the period in question by the number of hours of operation for the same period, to arrive at an hourly rate of \$7.79 per hour. The rate so arrived at would be for actual hours of operation based on this particular piece of equipment on the work in question for the period covered.

Q. 140. Do I understand that that hourly figure represents AGC rentals reduced?

Mr. Sweeney: May it please Your Honor, I am not interrupting to object, but may the witness

be permitted to testify where he obtained this source of data and how they computed it?

872 Commissioner Thompson: All right. Go ahead.

Mr. Ruddiman: I will withdraw the question.

By Mr. Ruddiman:

Q. 141. The next heading is Plus Maintenance Rate Figured at Actual Cost. For the Lima dragline you have a figure of \$4.25. Will you tell me where you obtained that figure? A. That figure was obtained from schedule prepared by Mr. Howard and introduced as Plaintiff's Exhibit 17-D, \$4.25 per hour for the Lima dragline for maintenance expense.

Q. 142. And the next column is headed Plus B. of R. Fuel and Lubricant Rate. Beneath this heading is the figure \$1.40. Will you tell me where you obtained this figure? A. That figure is the figure which the Bureau of Reclamation allowed per hour for fuel and lubricants for the Lima dragline, and our figure was somewhat different, so in order to avoid any question concerning the fuel and lubricants rate, I used the Bureau of Reclamation figure wherever available. In this particular case, the \$1.40 is the exact figure which they have allowed, and it would have to be added to the hourly rate as arrived at on this schedule, based upon the Associated General Contractors' ownership expense schedule 17-B, and which had the figure of \$4.27 added to it for maintenance. So that the three fig-

ures, the hourly rate based upon the Associated General Contractors' schedule, maintenance of \$7.79, the actual maintenance cost, is obtained from Plaintiff's Exhibit 17D, and the fuel and  
 873 lubricants allowance of the Bureau of Reclamation of \$1.40 make a total hourly rate of \$13.44 for the Lima dragline.

Q. 143. I notice opposite some of the figures under the heading Plus B. of R. Fuel and Lubricant Rate there appear asterisks. Can you explain that?

A. Yes. In some instances, the Bureau of Reclamation had not allowed a fuel and lubricant rate for the particular items of equipment involved. In those cases I made a calculation of what I thought was a comparable rate to what had been allowed by the Bureau on certain items of equipment. For example, in the case of the Euclid trucks, there are three classes, of which are the 12-yard rear dump, the 15-yard bottom dump, and the 20-yard bottom dump. The Bureau of Reclamation had allowed a figure of 56 cents for fuel and lubricants for the 12-yard rear dump and the 15-yard dump—bottom dump—and I used the same figure of 56 cents per hour for the 20-yard bottom dump. The asterisks are explained on the bottom of the second page, where it says, "Bureau showed no fuel and lubricant rate but used equivalent."

Q. 144. You used the phrase "but used equivalent." Did you use the equivalent? A. That's right. I used the equivalent, or what I thought was the equivalent.



Q. 145. The method which you have first outlined has applied to a single piece of equipment. Will you tell us how you computed the hourly rate when there were several pieces of equipment of the same class? A. Yes. For example, we might take the Euclid 12-yard rear dump truck, which is the third item on the schedule: In that particular case there were six of the Euclid rear dump trucks in operation on the project. And so on an eight months' basis for the first shift, I have multiplied the six, being the number of trucks in use, times the eight months' operation for each one of them, to arrive at a figure of 48 months of operation for one truck for the first shift; and the rate, 48 one-truck months is what the figure would be.

Similarly, for the second shift of operation, I have taken the six trucks for the six months of second-shift operation, and arrived at 36 second-shift truck months of operation.

Q. 146. In the next column for this piece of equipment appears the figure \$695 for first shift. Is that the rate for one month for one truck? A. That's right. The \$695 is the figure for one month for one truck for the first shift. So that figure would have to be applied to the 48, which is the number of truck months on the first shift, to arrive at the rental for the first shift for the six trucks of \$32,360, and for the second shift for the six trucks for the six months' operation of \$12,510, or a total rental

allowance of \$45,870 for the six months for  
875 the year in question.

By Commissioner Thompson:

Q. 147. What are these capital value? A. That is the capital value for just one truck.

Q. 148. One truck? A. That's right. In each instance, the second column from the left is the capital value for one item of equipment only.

Q. 149. All right. A. It must be remembered that under the Associated General Contractors' ownership expense schedule, a lot of factors are taken into consideration, such as depreciation, obsolescence, insurance, interest on investment, and all of the other actual items of expense which a contractor gets when he purchases equipment for operation.

By Mr. Ruddiman:

Q. 150. In the next column, under the heading Hours Worked 1940, appears the figure 12,845. What does that represent? A. 12,845 is the total number of hours that all of the six Euclid rear dump trac trucks worked during the period April to November, inclusive, 1940, and the total rental for all six was divided by the total number of hours of operation on all six to arrive at an hourly expense rate, based on the Associated General Contractors' schedule, of \$3.79 per hour per truck, and \$3.58 is the hourly rate per hour per truck.

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Q. 151. Where do you get the figure of

\$2.40 for maintenance? A. That figure is the actual maintenance expense as shown on Plaintiff's Exhibit 17-D.

Q. 152. And where do you obtain the figure of 56 cents shown for fuel and lubricants? A. The figure of 56 cents shown for fuel and lubricants for the 12-yard Euclid trac truck is taken from the information submitted to us by the Bureau of Reclamation under date of June 25, 1941, and is page 70 of Plaintiff's Exhibit 17.

Q. 153. Have you figured the hourly rate for the other equipment in the same way that you have described? A. I have, sir. And the hourly rate for each piece of equipment is the last column on the right-hand side, which rate includes a rental allowance based on AGC schedule; maintenance as figured on actual cost; and fuel and lubricants allowance as given to us by the Bureau, or its equivalent, for a total hourly rate for each hour of operation for one unit of equipment.

Q. 154. Each hour of actual operation? A. That's right, each hour of actual operation.

Q. 155. In general, can you tell me where you obtained the figures for the various pieces of equipment under the heading Capital Value, and under the next heading Approximate Per Cent of Capital

Value Per Month? A. The capital values in 877 most instances are the capital values as given by the Bureau of Reclamation. In some instances, they had no capital value for the

item of equipment in question, and in those cases I have used the capital value as shown in the equipment ownership expense schedule of the Associated General Contractors. The second column, the per cent of expense per working month, is obtained either from the Bureau of Reclamation schedule or the Associated General Contractors' equipment ownership expense schedule.

Q. 156. Is that per cent the same in both of those schedules? A. Normally, it is the same in both of those schedules. In the case of the Lima dragline, the Bureau allowed only 5.2 per cent, and the AGC schedule allowed 6 per cent, so I took the percentage allowed by the Bureau.

Q. 157. Will you tell us how you computed the hourly rate for the separation plant? A. In the case of the separation plant, we have taken the capital value of \$25,000, which is the original cost of \$20,000 plus \$5,000 additional for remodeling, to arrive at a total capital value of \$25,000.

Q. 158. Let me stop you there: That \$5,000 for remodeling, was that expense incurred prior to the time that you dismantled the separation plant in its original location? A. It was. And to that capital value has been applied a figure of 8 per cent for the per cent of capital value to be allowed for monthly ownership expense. In this particular case, based on a three-year life, as the machine had only a three-year life under actual conditions, I have used the 8 per cent figure, which is that



shown by the AGS schedule should be allowed for an item of equipment with a three-year life, based on an eight-months' operation.

Q. 159. State what you mean by the phrase appearing in this statement under the figure \$25,000 for separation plant, "3-Year Life of 8 mo. 8% Mo. (Same as Tamping Roller)." A. Yes, that is what is meant by it, and the 8 per cent is also shown by the Bureau of Reclamation as being the proper per cent for monthly ownership expense for an item which has but a three-year life worked on an eight-months' per year basis. The 8 per cent was taken from the Associated General Contractors' schedule; the Bureau had no comparable piece of equipment.

Q. 160. Why do you use a three-year life for this piece of equipment? A. That was all it lasted on the work in question, at Vallecito dam. It was purchased in 1938, and junked after the end of the 1940 working season.

Q. 161. It had three working seasons before it was junked? A. Yes, it had three years, 1938, 1939 and 1940, of operation.

879 Q. 162. It was new when you bought it?

A. It was new when we bought it.

Mr. Sweeney: Pardon me, did the witness say that the equipment was junked?

Mr. Shields: The separation plant.

By Mr. Ruddiman:

Q. 163. Will you explain to the Court the Waukesha motor. The International motor, and the Palmer 50 KV generator described on the statement? A. The separation plant as purchased did not include certain items of power necessary for its operation, so allowance has to be made for a Waukesha motor, an International motor, and the Palmer 50 KV generator, which were all necessary for the operation of the separation plant. Incidentally, the Bureau of Reclamation has allowed all of these items as part of the expense of the separation plant.

Taking the monthly rate that should be allowed for the separation plant for eight months for the first shift basis, six months for the second shift basis, and the monthly rate for the Waukesha motor for seven months only for the first shift operation and six months for the second shift operation, and the monthly figure for the International motor for seven months for the first shift operation and six months for the second shift operation, and the monthly figures for the Palmer 50 KV generator  
880 for six months for the first shift operation and six months for the second shift operation; we arrive at a total rental of \$24,114 and no cents, which should be allowed for the separation plant, including this auxiliary equipment for the period from April to November, inclusive, 1940. That figure of \$24,114 and no cents has been divided

by the total number of hours of operation of the separation plant for the period in question, which was  $1,601\frac{1}{3}$  hours, to arrive at an hourly rental rate of \$15.06. And to that \$15.06 has been added the actual maintenance expense per hour of \$3.67, as shown on Plaintiff's Exhibit 17-D, and the fuel and lubricants rate per hour of \$1.36, which was the figure allowed by the Bureau of Reclamation, to arrive at a total hourly rate for this separation plant, with the auxiliary equipment, of \$20.09 per hour. That is per hour of actual operation.

Commissioner Thompson: We will recess until 9:30 o'clock tomorrow morning.

(Whereupon at the hour of 3:45 o'clock, p. m., an adjournment was taken until 9:30 o'clock, a. m., Saturday, June 16, 1945.)

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Denver, Colorado  
Saturday, June 16, 1945.

Met pursuant to recess at 9:30 o'clock, a. m.

Appearances: As previously noted.

Reported: Leonard Rosenfield, Certified Short-hand Reporter.

And thereupon the following proceedings were had:

**George Leonard, resumed the stand for further  
Direct Examination**

**By Mr. Ruddiman:**

**Q. 164.** When we stopped yesterday you were explaining to the Court a statement you had prepared showing the hourly rates for equipment on this job. Does the AGC schedule list monthly rates for all of the equipment which you have listed in this statement? **A.** No, it does not. For example, the Euclid utility tractor, the last item on page 1. The equipment ownership expense schedule does not list that item, so I have taken an hourly rate of \$1.66 for equipment ownership expense, and to that added 25 cents for fuel and lubricants rate for a total operating rate of \$1.91, which is comparable to the other rates used based upon the Associated General Contractors' equipment ownership expense schedule.

There are one or two other places where it was not possible to get something entirely conclusive, as in the case of the 8-yard Hug trucks, the fourth item on the second page, and the number of hours of equipment use was not conclusive, so I have taken an hourly rate of \$1.95, which is comparable to the other rates on an hourly basis and based upon the AGC schedule. As a matter of fact, these Hug trucks have a capital value of \$8,650, and we have used an hourly rate of \$1.95, as compared with a capital value of the Euclid 15-yard bottom



dump trac trucks; Item No. 4 on the first page, of \$13,000, at an hourly rate computed on actual conditions on the project of \$3.79.

I have also used an hourly rate of a dollar an hour on the International one and a half ton flat-bed truck. These variations are noted on the schedule so that they are perfectly apparent and they are comparable and fair based upon the equipment ownership expense schedule.

Q. 165. I call your attention to the figures listed in the last column on this exhibit, and ask you do these figures correctly state for the period April to November, inclusive, 1940, hourly operational rates based upon the AGC schedule? A. They do, based upon the AGC equipment ownership expense schedule, with a proper and fair allowance for maintenance costs and fuel and lubricants costs.

Mr. Ruddiman: I offer this statement, Plaintiff's Exhibit 17-E.

Mr. Sweeney: Your Honor please, may we at this time ask your permission to defer the detailed cross examination touching this particular exhibit until after an audit has been completed? We  
883 would, however, just like to ask a few questions touching that.

(Colloquy.)

Mr. Shields: I think the proper procedure now is to cross examine this witness, and then put their auditor on to contradict him if he wishes to.

Commissioner Thompson: I think so, too. I

think you better put the witness on now for cross examination and later, if there is an opportunity, I will let you do it. But I am not going to require him to come to Washington, or require Mr. Shields to go on a long trip just for the purpose of examining on this exhibit.

(Colloquy.)

Commissioner Thompson: Cross examine him the best you can, and if it is possible and reasonable, I will give you another opportunity to cross examine him again, if it can be done without too much expense.

Mr. Sweeney: Thank you.

#### Cross Examination

By Mr. Sweeney:

XQ. 166. Mr. Leonard, please, referring to Plaintiff's Exhibit C, the first item, Capital Value, will you tell His Honor, please, do these amounts represent depreciated value of the particular equipment, based upon their age, use, wear and tear that they have been subjected to, or do those capital values represent the original cost of the equipment? A. The capital values in most instances represent the original cost, which is the basis upon which the Associated General Contractors' equipment ownership expense schedule is based; and it is also the basis which the Bureau of Reclamation stated they were using in arriving at their rates.

XQ. 167. Tell His Honor, please, where are the records, that is, the books and records, from which this exhibit was made, so we will know for our auditors where they will be available for examination? A. They were made from the Associated General Contractors' equipment ownership expense schedule, which is an exhibit; from the Bureau of Reclamation letter of June 25, 1941, which is an exhibit, as page 70 with attached papers; of Plaintiff's Exhibit 17, and the maintenance rates are taken from Plaintiff's Exhibit 17-D, which is in evidence.

Commissioner Thompson: Just a minute. Let us don't get off on maintenance rates. Let us stick with the capital values.

The Witness: I understood he was asking for all of them.

Mr. Sweeney: This question did go to all of them, so the auditors will know where are the records.

Commissioner Thompson: All right. Go ahead.

A. (Continuing) The maintenance rates were taken from Plaintiff's Exhibit 17-D, which is in evidence; and the fuel and lubricants rate taken from page 70 an attached document of Plaintiff's Exhibit 17, with some figures which have been supplied by me, covered by my testimony, where they were not available. And I believe all of the information on this schedule is obtained from documents which are in evidence.

By Mr. Sweeney:

XQ. 168. Now, please, referring to Plaintiff's Exhibit 17-D, as you referred to in the item of Repair Parts for Period, for example, column 1, for example, with respect to column 1, Lima 31½-yard dragline. The amount you have set up for the repair parts for the period noted, that is from April to November, 1940, \$8,195.41. What part is that of the capital value of that piece of equipment? Do you recall offhand? A. Would you read the question, please?

(Last question repeated by the reporter.)

A. Approximately twenty per cent.

By Mr. Sweeney:

XQ. 169. Twenty per cent of it. Mr. Leonard, please, tell His Honor, does that include, or isn't it a fact that that also includes some major replacements of equipment as well as these minor repairs?

Mr. Ruddiman: I object to this line of testimony. This witness did not prepare that exhibit.

Commissioner Thompson: If he knows he may answer. Overruled.

By Mr. Sweeney:

XQ. 170. You may answer. A. What was  
886 the question?

(Last question repeated by the reporter.)

A. I didn't prepare it all. I would know from hearsay; from Mr. Howard's testimony.



By Mr. Sweeney:

XQ. 171. Now referring to Plaintiff's Exhibit 17-E, and the items of equipment noted thereon. Tell His Honor, please, were these items of equipment originally owned by the plaintiff at the start of the job or did you acquire some of them after the job began? A. Most of the equipment covered by this schedule was purchased new, after acquiring on the job.

XQ. 172. Now, please, in view of your last answer, have you a copy of the exhibit? A. Yes, I have.

XQ. 173. Will you tell His Honor, please, if there is a Euclid trac truck rear dump 2 ZWC L 80 listed thereon? A. No, there is not.

XQ. 174. Referring, please, to Item No. 3 on Plaintiff's Exhibit 17-E for identification, tell His Honor please, if that type of Euclid 12-yard rear dump trac truck, wherein you set up a capital value of \$12,750, in fact, does not include the truck I just mentioned. A. No, sir. These are FDT trucks. The trucks you are talking about were traded in on the purchase of the newer trucks purchased specifically for this job. The capital value in this particular case agrees with the capital value given to them by the Bureau of Reclamation on page 70 and attached papers of Plaintiff's Exhibit 17.

XQ. 175. That is where you got that figure. Now, you mentioned— A. Incidentally, the figure is correct.

XQ. 176. We are not questioning that, though, Mr. Leonard, please. What we are trying to get at is the capital value of this equipment, whether it was new or second hand. A. The trucks in question, the third item on Plaintiff's Exhibit 17-E, were all purchased new for the Vallecito dam project by the Martin Wunderlich Company, and had not previously been used on any construction project.

XQ. 177. When were they purchased, please? A. They were purchased, I believe, in the spring of 1939.

XQ. 178. Now, you say that the old trucks were traded in. Are those trucks that were owned by the partnership? A. Yes, they were.

XQ. 179. Isn't it a fact that when this job began in 1938, that certain equipment, including Euclid trac truck rear dump No. 2 ZWC L 80; Euclid trac truck rear dump 2 ZWC L 4; Euclid trac truck rear dump 2 ZWC L 5; Euclid trac truck rear dump 2 ZWC L 7; Euclid trac truck rear dump 2 888 ZWC L 9; Lima shovel 1 No. 451; R 18 caterpillar tractor No. 1 H 849; RD 7 caterpillar tractor No. 9 C-1274 W; General Electric welder No. 1692359; Kohler light plant No. E 24883; Kohler light plant No. E H 30050; two-ton International truck (flat bed) No. C-35-17868; Schramm compressor, model 315, No. 315028, were rented by the partnership early in 1938 from Dale B. Levi of Denver? A. I have a very good memory but, obviously, I could not hope to remember serial numbers of

equipment from 1938, to the present time. But I can answer your question generally, that none of this equipment was rented from Dale B. Levi, or anybody else.

XQ. 180. They were not? A. No, sir.

By Commissioner Thompson:

XQ. 181. None of which equipment? A. The equipment he referred to, generally speaking. I think I know the equipment generally that he spoke about.

By Mr. Sweeney:

XQ. 182. Just from that general description I have given you now, tell His Honor please, are any of the items I have just named, from the general description, included in Plaintiff's Exhibit 17-E for Identification? A. I certainly cannot remember serial numbers for a period of seven years.

I wouldn't attempt to be specific as to any  
889 item of equipment in that connection.

XQ. 183. You are the man that really knows what equipment this partnership owns or used on this job, or what equipment they had before they started. A. I am familiar with the Martin Wunderlich Company equipment, yes.

XQ. 184. And isn't it a fact when you started this job you had a capital value on all of your equipment of about one hundred eighty-seven or ninety thousand? A. I wouldn't remember.

XQ. 185. Just roughly. A. I wouldn't remember. As a matter of fact, most of the equipment covered by the schedule was purchased new after we obtained the job.

XQ. 186. Refer, please, to Plaintiff's Exhibit E, the second item, and tell His Honor, please, the Lima shovel, when was that purchased? A. That was purchased, I believe, in 1936.

XQ. 187. That is the year before the job started? A. Two years.

XQ. 188. Two years. Now tell His Honor please, is that the Lima shovel that was rented by the partnership from Dale Levi? A. The partnership rented no equipment from Mr. Dale Levi.

890 XQ. 189. The partnership rented no equipment from Mr. Dale Levi? A. That's right.

XQ. 190. Now, referring to Item No. 3. You have already touched that. Did the partnership rent that equipment from Mr. Dale Levi in August or early in 1938, or any other time during the period of this job. A. This equipment in Item 3 was not yet made in 1938.

XQ. 191. When was that purchased by the plaintiff? A. I have already testified I believe it was purchased in the spring of 1939.

XQ. 192. 1939? A. Yes.

XQ. 193. Now refer, please, to the Item RD-8 caterpillar tractors. How many caterpillar tractors are involved in the item—more than one? A. There are nine of them.



XQ. 194. Nine? A. Yes.

XQ. 195. Tell His Honor please, if these tractors were rented by the partnership from Mr. Dale Levi for use on this job. A. No equipment was rented by the partnership.

XQ. 196. Just this item, please.

891 Commissioner Thompson: If he tells you that no equipment was rented, what is the use of asking as to each particular item?

By Mr. Sweeney:

XQ. 197. In view of His Honor's admonition, is your answer that none of the items listed on Plaintiff's Exhibit 17-E were rented from Dale Levi? A. That is correct. None of the equipment listed on Plaintiff's Exhibit 17-E was rented from Dale Levi.

XQ. 198. At any time during the course of this work? A. At any time during the course of this work.

XQ. 199. Were they purchased by the partnership from Dale Levi? A. No, they were not purchased by the partnership from Dale Levi.

XQ. 200. Were all of the equipment that are listed on this exhibit originally owned by the partnership, or subsequently acquired by it during the performance on this job or for use on the job? A. Every item of equipment listed on this schedule, as near as I can recall now, at least, was purchased new by the Martin Wunderlich Company partnership.

XQ. 201. And your books and records will contain the pertinent data showing the date of acquisition? A. I believe so.

892 XQ. 202. And the date any old equipment was traded in? A. I believe so.

XQ. 203. And the amount allowed on the new equipment, and so forth? A. Yes.

XQ. 204. Now will you refer to page 2, coming down to the item of Separation Plant, the eighth item, Separation Plant. It is noted that the original cost of that plant is \$20,000. Am I correct in my understanding that the plant was originally purchased by the partnership from the Robbins Company at a contract price delivered of \$18,000? A. The \$18,000 figure is correct. But the Associated General Contractors equipment ownership expense schedule provides that to that must be added the original cost of erection, freight and transportation. It must be recalled that this project was not located on the railroad, and it was extremely expensive and difficult to get equipment into it. So that the capital value which was set up for this machine must include something in addition to the factory price.

XQ. 205. Your books and records will show exactly how you arrived at the \$20,000 base figure? A. The \$20,000 base figure is also used by the Bureau of Reclamation in the schedule attached to their letter of June 25, 1941, which is page 70 of Plaintiff's Exhibit 17.

893 XQ. 206. We understand that, please—  
Commissioner Thompson: Wait a minute.

That does not quite answer his question. He wants to know if your books and records will show the extra \$2,000 you capitalized, along with the \$18,000.

The Witness: I have testified, Your Honor, that the \$20,000 figure in this particular case was obtained by using the figure which the Bureau of Reclamation agreed was the capital value on this particular item, and that is where the \$20,000 figure was obtained.

By Mr. Sweeney:

XQ. 207. The amounts above \$18,000, then, of the original purchase price of the equipment delivered represents an item based upon the factors you have considered and just testified to, and the AGC rates? A. The Bureau of Reclamation—that the Bureau of Reclamation considered, because I have used their figures.

XQ. 208. I am asking you what figures you took. Sometimes the Government's are not only fair and just but they are extremely generous. We want to know just what figures you used. A. I believe the \$20,000 figure is low.

XQ. 209. Do you think it is low? A. Yes, sir.

XQ. 210. Then you have an item, please, for remodeling, one-third remodeling and reinforcing, \$5,000. Is that one-third of this amount of

894 — \$15,074.90 that was set up in the plaintiff's Bill of Particulars that was filed in connection with the claim prosecuted by the Robbins Com-

pany against the partnership for "attempting to make said equipment capable of performing as plaintiff represented it would and could perform"?

A. It is approximately one-third of a \$14,000 figure of expense we had on this plant for remodeling costs.

XQ. 211. Now, please refer to the equipment items that follow and that relate to the separation plant and that total, \$29,538, that is added to the sum of twenty-five, that would be \$4,538. Tell His Honor, please, if it is not a fact that those are the items of equipment that were added to this separation plant at the time that the plant was remodeled during the period that they started operations in April, 1940, to June 21, 1940. A. What was that?

(Last question repeated by the reporter.)

A. I don't know when these particular items of equipment were added to the plant.

XQ. 212. Tell His Honor, please, if it is not a fact that the plant was set up for operation on May 12, and ran a test run in the presence of Mr. Wunderlich, and it was unsatisfactory, and then the equipment was torn down and moved. Do you recollect that? A. No, I don't recall. I wouldn't know about that.

895 Mr. Sweeney: Strike "torn down." It was just moved and remodeled. Strike that question, Your Honor, please.



By Mr. Sweeney:

XQ. 213. Do you recall, please, that following a short test run in the presence of Mr. Wunderlich on May 12, 1940, that the plant was shut down during the period of May 13, 1940, to June 21, 1940, during which time the partnership remodeled the plant to eliminate the difficulties of operation that were encountered during the short test run? A. All I could testify to that would just be hearsay.

XQ. 214. That is, you were not on the job, were you? A. Not at that time.

XQ. 215. Very few times? A. Just infrequently.

XQ. 216. For example, this Captain Frenam, the office engineer on the job, when is the first time you ever saw him? A. I don't know for sure. I believe it was the other day.

XQ. 217. Just the other day? A. I believe so.

XQ. 218. Did you ever see him on the job? A. I don't recall that I did. I moved.

XQ. 219. You were not on the job very often. Your business was taking care of the office and managing the business of the partnership, is that correct, Mr. Leonard? A. That's right.

896 XQ. 220. You were not a field man? A. I do not do office work. I have not been to the Jefferson City office but three times in the last six years.

XQ. 221. You understand what I mean—you are Mr. Wunderlich's trouble-shooter and general manager, and you run the business for him? A. I am general superintendent, yes, sir.

XQ. 222. Tell His Honor, please, if it is not a fact that this remodeled separation plant that is described on Plaintiff's Exhibit 17-E, page 2, began operating June 21, 1940, and kept running continuously in that pit for the remainder of the season up to the date you have noted on the exhibit, November, 1940, and that it operated very satisfactorily?

A. The question will require a measure of interpretation.

XQ. 223. Yes. A. The plant was set up or started as set up originally in April, and was on this particular item until November. As to how satisfactory it operated, most of my evidence will be hearsay, but it did screen out to approximately 900,000 cubic yards of cobble material, and I believe operated satisfactorily.

XQ. 224. Nine hundred thousand cubic yards of cobble or earth material? Which? A. Cobble.

897 XQ. 225. Isn't it a fact that you encountered a comparatively small amount of cobble material in Pit 2, that there has been so much discussion on, that it was practically one-tenth of the total of the earth material excavated from that particular borrow? A. That would depend upon what you call cobbles. Cobbles are defined as all materials over two and a half inches in diameter. I believe on the basis of that size the percentage would be somewhere between twenty and thirty per cent. As a matter of fact, all screening was done on the basis of a five-inch screen at writ-

ten request to the Bureau of Reclamation, and on that basis the percentage would, of course, be somewhat less.

XQ. 226. Mr. Leonard, please, we have reference to cobbles as defined in this contract. A. Cobbles as defined in this contract, if I recall correctly, are all rock—

XQ. 227. You do not need to read it, please. A. I was not through, sir.

XQ. 228. I am referring to the cobbles as defined by this contract. A. I haven't finished my answer.

XQ. 229. Go ahead. A. Cobbles as defined in this contract, I believe, is all rock over two and 898 a half inches in diameter.

XQ. 230. From what paragraph are you now reading, so the record may be complete? A. I wasn't reading from a paragraph, but I think I can find it.

XQ. 231. Yes, tell the Court just what paragraph you are referring to. A. The cobble and rock fill shall consist of cobbles—

XQ. 232. What paragraph are you reading from? A. Paragraph 52 of Plaintiff's Exhibit A.

XQ. 233. 52, did you say? A. 57, of Plaintiff's Exhibit A, headed, "Cobble and Rockfills on Slopes of Embankment," and I quote, "The cobble and rockfills shall consist of cobbles over two and a half inches in diameter separated from required excavation and from materials excavated from cobble borrow pits as provided in paragraph 51." I believe that is the only place where cobbles are defined.

XQ. 234. Well, now, will you please refer to paragraph 56 on page 87? Have you the specifications referring to paragraph 56, and for the record, it is on page 87—strike that.

Commissioner Thompson: I think you are both getting into an argument about the question to be decided.

Mr. Sweeney: No, we are not concerned with side remarks, Your Honor. We are referring 899 now to this complaint, and will be very brief.

By Mr. Sweeney:

XQ. 235. This plant you were referring to, please, you set up a total capital value of \$29,538—including the parts that were added when it was remodeled in 1940, is that correct, Mr. Leonards? A. I was answering, sir, including the auxiliary equipment which had to be added to the power plant to make it operate.

XQ. 236. And that was in 1940, wasn't it? A. I have testified I don't know exactly when these items were added.

XQ. 237. Well, you have set up rental rates for the period between April to November, 1940. Are you including something that was added in 1938, or 1939? A. They were added prior to April of 1940, or thereabouts, and they were used with this separation plant during the 1940 operating season.

XQ. 238. That is what we want to know. They may have been purchased in anticipation or purchased prior to the period noted on page 2 of this



exhibit, for the purpose of remodeling the plant so it would operate more efficiently in 1940. A. They may have been added to the plant prior to 1940, but they were on the plant in 1940, and operated with it.

900 XQ. 239. Please calculate the figures and tell His Honor if the total is \$29,538 for the separation plant, including the auxiliary parts. A. I believe that figure is correct.

XQ. 240. Now, refer, please, to the column Total Rental for Year. Have you found that? A. Yes, I have it.

XQ. 241. The figures noted on page 2 of Plaintiff's Exhibit E state that the total rental for the year for this equipment is \$24,114. Now, tell His Honor please, if that is the rental for the period during which this plant was operating in 1940, whatever that was, that is, during the working season. A. Well, the word "Rental" will probably require a measure of definition.

XQ. 242. Will you answer my question directly, and then if you wish to amplify it or make any explanation, I am sure His Honor will permit you to.

Commissioner Thompson: Read the question back and let us see what it is.

(Last question repeated by the reporter.)

Commissioner Thompson: What is this rental of? I mean, for what period?

Mr. Sweeney: This is the rental, Your Honor please, of the separation plant—those are the figures.

Commissioner Thompson: Yes, but for what period of time?

901 Mr. Sweeney: For the period noted on this exhibit. It states for the period from April to November, 1940. I am asking if that is not the rental rate for the period during which it was actually operating during the working season. A. That figure of \$24,114 is equipment ownership expense based on the Associated General Contractors' equipment ownership expense schedule which is in evidence.

By Commissioner Thompson:

XQ. 243. Now, for what period of time? A. For the period as stated on the exhibit—April to November, 1940.

XQ. 244. That is all it includes? Is that all the time it includes? A. That would also require some explanation. This is the amount of money which, according to the equipment ownership expense schedule should be recovered to cover six items of expense for the calendar year 1940, and that recovery must be during the period when the equipment is operating.

By Mr. Sweeney:

XQ. 245. Now, Mr. Leonard, please, you just referred to six items of expense. Are those the six items of expense referred to on page 1 of the AGC rates in evidence as Plaintiff's Exhibit 17-B? Under the heading of "Explanation of Items of

Equipment Ownership Expense, Contractors' Annual Equipment Expense," as far as pertinent, starts, "The annual equipment expense is 902 composed of but six items, which are as follows: (1) Depreciation, (2) Major Repairs and Overhauling, (3) Interest on the Investment, (4) Storage, Incidentals and Equipment Overhead, (5) Insurance and (6) Taxes." Those are the cost factors that you referred to? A. Those are the cost factors involved in the equipment ownership expense, as agreed with the Bureau of Reclamation for the claim in question.

XQ. 246. You say that is based upon the Bureau of Reclamation figures. All right. Now, sir, please, on your direct you testified that this separation plant had a life of only three years. What is that based upon? I ask you to refer to Plaintiff's Exhibit 17-B, AGC rates, and referring to any data in that exhibit on the basis of which you just testified the statement that this plant had only a life expectancy of three years. A. I testified that the actual life was three years.

XQ. 247. Now, you disregard the data set forth in the AGC rates, Plaintiff's Exhibit 17-B. A. No, I don't sir. I followed them specifically.

XQ. 248. What is that? A. I followed that specifically.

XQ. 249. You do? Isn't it a fact, please, that the AGC rates in evidence as Plaintiff's Exhibit 17-B on page 16—have you that in front of you?

Have you page 16, now? Have you found  
903 the comparable equipment referred to in the  
AGC rate schedule and that you referred to  
and have been referring to in your testimony?

Commissioner Thompson: On page what?

Mr. Sweeney: On page 16, Your Honor, please.

Commissioner Thompson: Page 16?

By Mr. Sweeney:

XQ. 250. Under the heading "Pit and Quarry Plants (Portable)" that "16" is at the bottom of the page and is headed, "Pit and Quarry Plants (Portable), Crushing and Loading," then you come down to "Crushing, Screening and Loading," and then refer, please, to the heading, "Heavy-duty single crusher, large capacity," and tell His Honor, please, what the depreciation rate is for that item of equipment, Mr. Leonard. A. The crusher?

XQ. 251. "Crushing, Screening and Loading \* \* \* heavy-duty single crusher, large capacity," and tell His Honor, please, what the depreciation rate is. Isn't it a fact that 17-B—

Mr. Shields: One question at a time, please.

Commissioner Thompson: Wait a minute. You are lumping two items together.

Mr. Sweeney: No, Your Honor, just one. May I ask this question?

By Mr. Sweeney:

XQ. 252. Referring to page 16 of the AGC schedule, which is Plaintiff's Exhibit 17-B, will



904 you tell His Honor the comparable equipment listed in that schedule that you used when you used the AGC rates in making your calculation on Plaintiff's Exhibit 17-E? A. My testimony is that we have used an actual life on this particular item of equipment because it was used only on this project, and on the basis of the actual life of three years, I used an eight per cent per month figure—

Mr. Sweeney: I pray Your Honor's judgment, please, the answer is not responsive. I have been most reluctant heretofor to interrupt this witness while he is rambling on, and I have asked a direct question.

Commissioner Thompson: Ask the question again.

Mr. Sweeney: This is very important.

Commissioner Thompson: Ask him. Go on. Reask him and get started.

Mr. Shields: I wouldn't talk about rambling—

Mr. Sweeney: When you stopped to ramble—

Commissioner Thompson: Just a minute! Go on and ask the question.

Mr. Sweeney: Well, I made a hole for that one, Brother George.

By Mr. Sweeney:

XQ. 253. Referring to page 16, please, of the AGC rental schedule in evidence as Plaintiff's Exhibit 17-B, and point out to His Honor the  
905 comparable equipment in this schedule that

you used in calculating the rates relating to separation plant set out on page 2 of Plaintiff's Exhibit 17-E. Just describe it. A. I haven't testified—

By Commissioner Thompson:

XQ. 254. Can you point out the comparable equipment in your screening plant? A. Yes, I can.

Mr. Sweeney: Read it, please, for the record. A. (Continuing) "Screening and Loading" plant, none of which have been referred to before by the defendant's attorney, which is the sixth item below the heading "Pit and Quarry Plants (Portable)."

By Commissioner Thompson:

XQ. 255. Is that Heavy duty, large capacity? A. Heavy duty, large capacity, screening and loading plant, which has an equipment ownership expense rate of 6.7 per cent base rental.

By Mr. Sweeney:

XQ. 256. Wait, please. Just answer my question. You are going beyond my question. Go ahead.

Commissioner Thompson: He has answered the question. Ask him another one.

By Mr. Sweeney:

XQ. 257. Tell His Honor please, if it is not a fact that the depreciation rate applicable to that  
906 equipment described you have is 17 per cent.

A. On the items covered here the depreciation rate is 17 per cent.

XQ. 258. That is a six-year life expectancy, isn't it? A. Approximately, yes.

XQ. 259. Now, you testified to His Honor that this equipment was junked. When was it junked? A. After completion of the project.

XQ. 260. That was sometime in 1940, was it? That is, when you completed your excavation work at the site? A. No. I believe it was later than that.

XQ. 261. Tell His Honor please, if it is not a fact that after the plaintiff in this suit received the contracting officer's findings, this separation plant was sold and shipped out of the site? A. It was sold as junk, yes. We got what salvage out of it we could.

XQ. 262. You sold it as junk? A. Yes, sir.

XQ. 263. Did you make any effort to renew or replace certain parts of the equipment? Did you make any effort to do that before you sold it, or, rather, solicited proposals for its purchase? A. I don't believe so. We did attempt to sell it as  
907 a plant but were unable to. I think it laid around the job for a couple of years after completion of the project.

XQ. 264. A couple of years after the job was completed? A. Yes.

XQ. 265. You are referring to the time that the excavation was completed, is that correct? A. That the work which this plant did was completed, yes.

XQ. 266. Isn't it a fact that at that time certain replaceable parts could have been renewed and the equipment continued in use indefinitely? A. You

can start with any kind of junk and make a plant out of it if you put in all new parts.

XQ. 267. Could you do it with junk? A. Yes.

XQ. 268. And this equipment was junked when you finished using it in 1940? A. We junked it. I am not saying it was junk when we finished using it.

XQ. 269. Do you remember whom you sold it to? A. Yes.

XQ. 270. Did you sell it to a junk man? A. I sold it to an equipment dealer in Los Angeles.

XQ. 271. And the name of the equipment dealer? A. Wes Durston.

908 XQ. 272. Los Angeles is a considerable distance from the site of this dam at Vallecito, Colorado, isn't it? A. It is.

XQ. 273. A pretty expensive proposition to ship out a heavy plant like that to Los Angeles, isn't it?

A. It wasn't shipped. Durston had a heavy trailer truck going through that territory which he purchased in the East, and he picked it up with that and hauled it to Los Angeles along with some other junk.

XQ. 274. Assuming it is a thousand miles or more, or, anyway, whatever the distance is, a junk man would not be called upon to haul a plant a thousand miles across the country; would he? A. I have explained what happened to it.

Mr. Sweeney: That is all on this now, Your Honor, please, and we reserve the right, as we requested at the outset, to cross examine in detail



when we receive the auditor's report. Thanks, gentlemen.

Mr. Ruddiman: I renew the offer of this statement as an exhibit.

Commissioner Thompson: Yes, let it be filed.

Mr. Sweeney: May the record show an objection by the defendant, Your Honor please, on the ground that the exhibit obviously does not reflect the fair and just rates based upon either the AGC schedule or the Bureau's rates.

909 Commissioner Thompson: Let the record show the objection is overruled and exception taken.

(The document referred to above, marked Plaintiff's Exhibit 17-E, is filed in connection with this case.)

### Redirect Examination

By Mr. Ruddiman:

RDQ. 275. You have testified that the most of the equipment shown in Plaintiff's Exhibit 17-E was new. Is that correct? A. That is correct.

RDQ. 276. And what was the condition of the balance of the equipment prior to April, 1940? A. The balance was in good operating condition.

Mr. Ruddiman: That is all.

Mr. Sweeney: No further cross, Your Honor.

Commissioner Thompson: Is that all of this witness?

Mr. Rudiman: Just a little bit more.

By Mr. Ruddiman:

RDQ. 277. Have you prepared a statement showing the cost of operations in the cobble borrow in Borrow Pit No. 2 during 1940? A. I have.

RDQ. 278. Is this the statement to which you refer? A. It is.

RDQ. 279. Will you explain to the Court the figures on that statement? A. Yes. This is headed Vallecito Dam Project. Summary, Actual 910 Cost Cobble Borrow, 1940. The first heading is Labor, total of \$61,193.72. Under that is listed amounts paid for insurance and taxes in the amount of \$6,112.63.

RDQ. 280. Where did you obtain those figures? A. Those figures were obtained from page 86 of Plaintiff's Exhibit 17, as testified to by Mr. C. V. Howard.

The next heading is Equipment Rental. The items of equipment, hours of equipment, were obtained from the same page 86 of Plaintiff's Exhibit 17. The rates of equipment have been obtained from Plaintiff's Exhibit 17-E, about which I have just testified. The amounts are computations, for a total equipment rental of \$313,272.95. That figure is referred to as Equipment Rental. As a matter of fact, it includes equipment ownership expense, plus maintenance rate, plus fuel and lubricants rate. The figures on the material for remodeling and setting were obtained from page 86 of Plaintiff's Exhibit 17, as were the figures on Dynamite and

Supplies. The balance of the figures are either multiplications or additions to arrive at a total expense on borrow pit No. 2, for the year 1940, of \$422,960.99.

RDQ. 281. The last figure you mentioned includes 10 per cent for profit? A. It includes ten per cent but not for profit. That is principally overhead. We obtained the figure from the ten per cent which the Bureau of Reclamation says they allowed for overhead and profit, but as a  
911 matter of fact, it wouldn't cover the overhead.

RDQ. 282. And the figure to which you have applied the ten per cent is \$384,509.99? A. That's right.

RDQ. 283. And does that represent the cost of operations in borrow pit 2 during the year 1940, as shown by plaintiff's records? A. It does. Except that there are items of cost that are not taken into consideration. For example, there is no allowance in this for a proportion of the expense of moving in and out of the bulk of the equipment, so that this statement covers only the items of costs as shown on the schedule.

Mr. Ruddiman: That is all on that. I offer that as Plaintiff's Exhibit 17-F.

#### Recross Examination

By Mr. Sweeney:

RXQ. 284. Tell His Honor please, when was this exhibit prepared, Mr. Leonard? A. This was pre-

pared within the last week, in the Cosmopolitan Hotel.

RXQ. 285. Just one question: Plaintiff's Exhibit 17-E, when was that prepared, Mr. Leonard? A. At the same time.

RXQ. 286. And the source of the data, please, used in making the calculations? A. I have  
912 just testified that the bulk—

RXQ. 287. You have indicated that— A. (Continuing) —of the information was obtained from page 86, I believe it is, 86 and 87, of Plaintiff's Exhibit 17, and that the rates on the equipment are taken from Plaintiff's Exhibit 17-E.

RXQ. 288. Does this exhibit list so-called rock rakes, and bulldozers that were used on the job?

Commissioner Thompson: Covers what?

Mr. Sweeney: The rock rakes and bulldozer, if Your Honor please, in addition to the screening plant. A. There are no rock rakes listed as such.

By Mr. Sweeney:

RXQ. 289. Refer, please, to the item of Sheep-foot Roller, under the heading of Equipment Rental, and tell His Honor where that is listed on the exhibit. A. I can only speak from hearsay on that.

Mr. Sweeney: Defendant objects to the offer in evidence of this document, Your Honor please, on the ground it does not reflect a fair and just rental rate of the equipment used in connection with these operations.



Commissioner Thompson: I will overrule the objection and let it be filed for whatever it is worth.

913

### Redirect Examination

By Mr. Ruddiman:

RDQ. 290. I will show you Plaintiff's Exhibit 17-A, and particularly plaintiff's letter of April 8, 1941, to Mr. Burns, enclosing a claim for adjustment under Order for Changes No. 3. This letter appears at page 1 of Plaintiff's Exhibit 17-A. I will ask you if pages 2 and 3 and the following pages are the detail sheets referred to in the letter on page 1.

Commissioner Thompson: How many pages following? There are a raft of pages. Do you mean all that follow? There are a lot of pages.

Mr. Ruddiman: All pages following: A. Yes, the pages from 2 to 172 are the detail sheets referred to in the letter, page 1 of Plaintiff's Exhibit 17-A.

Commissioner Thompson: Were they enclosed with the letter?

By Mr. Ruddiman:

RDQ. 291. Were they enclosed with the letter?  
A. Yes, they were.

RDQ. 292. I call your attention to the rates of equipment appearing at page 2 of Plaintiff's Exhibit 17-A, and ask you who prepared these rates.  
A. I did.

RDQ. 293. Will you tell the Court what you took into account in preparing these rates? A. 914 They are based on the Associated General Contractors' equipment ownership expense schedule. The equipment ownership expense schedule lists nothing but monthly rates. The time of operation of the various items of equipment under Order for Changes No. 3 was kept on the basis of hours of actual operation. So that it was necessary, in order to arrive at the cost, to reduce the equipment ownership expense monthly rates to hourly rates, and to add thereto proper allowance for maintenance and fuel and lubricants. We arrived at the hourly rate by taking the Associated General Contractors' monthly rate for one shift of operation and dividing that by 30, to get a supposed daily rate, and dividing that daily rate by 8 to get an hourly rate, and to that was added the figure for maintenance and fuel and lubricants.

Mr. Sweeney: Pray Your Honor's judgment, we submit that has been gone into extensively heretofore on direct in explanation as to how these figures were arrived at on this exhibit.

○ Commissioner Thompson: I think he is entitled to introduce whatever testimony he needs to on this, so let him go ahead.

By Mr. Ruddiman:

RDQ. 294. Weren't you operating on a two-shift basis every month of this period? A. We were.

RDQ. 295. Why did you use the one-shift rate, then? A. In reducing a monthly rate to an  
 915 hourly rate, ~~some allowance must be given~~  
 for the inevitable lost time, and in taking the monthly rate for one shift and reducing it to an hourly rate, we had thirty days a month and an eight-hour day, we figured we were making a fair and just allowance for idle time.

RDQ. 296. I show you a letter dated June 23, 1942, from the plaintiff to Mr. Harper, purporting to enclose corrected figures on the cost of operations in borrow pit No. 2, and will ask you if that letter was sent? A. It was.

RDQ. 297. That letter, incidentally, appears at page 85 of Plaintiff's Exhibit 17. And were all of the sheets which follow this letter enclosed with the letter? A. Sheets 86, 87, 88, 89, 90, 91, 92 and 93, of Plaintiff's Exhibit 17, accompanied the letter of June 23, 1942, which is sheet 85 of Plaintiff's Exhibit 17.

RDQ. 298. I call your attention to the rates for equipment appearing at page 2 of Plaintiff's Exhibit 17-A. A. They were computed in the same manner. In some instances, both of these statements referred to a different hourly rate used for items of equipment used less than 100 hours per month.

Mr. Ruddiman: That is all on 17.

Commissioner Thompson: We will recess for a few minutes.

(Short recess.)

916 Mr. Ruddiman: Your Honor, I have one more question I want to ask on Claim 17.

By Mr. Ruddiman:

RDQ. 299. I call your attention to the figures used by the Bureau in computing their rental rates, and in particular to page 73 of Plaintiff's Exhibit 17. I note that they have used a figure of thirty cents an hour for maintenance of a Lima dragline. Based on your experience, does this represent a reasonable rate for maintenance on a Lima dragline? A: No, the thirty cents per hour is ridiculously low. That Lima dragline has a capital value of \$39,000, and the Bureau has used a figure allowed slightly higher than the caterpillar RD-8 tractor, which has a capital value of \$79,000, approximately, which is roughly one-fourth of the capital value of the machine in question. And they have added only seven cents per hour to the caterpillar maintenance rate which they used, and that in itself was ridiculously low. So that the figure of thirty cents per hour would not even begin to take care of the maintenance expense on a 3½-yard Lima dragline.

RDQ. 300. Is that true of the rates for maintenance used by the Government on the other pieces of equipment? A: Yes, it is. The next item is a Euclid tractor truck, on which they allow eighteen cents an hour. The tractor truck has a capital value of \$13,000, and eighteen cents would not take care of the maintenance on your upkeep. All of



917 their maintenance rates are ridiculously low.

Mr. Ruddiman: That is all.

### Recross Examination

By Mr. Sweeney:

RXQ. 301. Mr. Leonard, please, you know, as a matter of fact, that the Bureau rental schedule in evidence, Plaintiff's Exhibit 17-C, is based upon the Associated General Contractors' schedule of average ownership expense—you are familiar with that? A. Up to the point that it computes its monthly rates as based upon the Associated General Contractors' equipment ownership expense schedule.

RXQ. 302. Only to that point, so far as you understand and interpret it? A. That's right.

RXQ. 303. On direct, you explained to His Honor how you reduced the monthly rate and calculated an allowance for idle time. Do you recall that? A. Yes, I do.

RXQ. 304. Now, we invite your attention, please, to page 3 of the AGC manual in evidence as Plaintiff's Exhibit 17-B, and only to the first three lines, headed Daily Equipment Expense. "Since the idle time of equipment is taken care of by a factor in the monthly expense, no such factor should be used in computing a daily rate." Are you familiar with that? A. Yes, sir.

918 RXQ. 305. Are you also familiar with the provision in the Bureau of equipment rental

schedule, Plaintiff's Exhibit 17-C, paragraph 2, subparagraph (e), "For each machine, a period of idle time each year is allowed; hence, no further allowance in rental rate is required for the time consumed in moving equipment to and from a job or for time out for repairs." Were you familiar with that also when you testified? A. Yes, I am.

Mr. Sweeney: That is all. Take the witness.

### Redirect Examination

By Mr. Ruddiman:

RDQ. 306. Are you also familiar with the statement appearing at page 2 of Plaintiff's Exhibit B, which provides that the monthly rate is not subject to deductions for Sundays or holidays, and should be charged for the full calendar period elapsing between shipment to and from the job? A. I am, sir.

RDQ. 307. And are you familiar with the provision appearing at page 3 of this exhibit reading as follows: "When a machine is charged to a job on a daily basis the rate should be charged for each calendar day without deduction for Sundays and holidays or other idle time during the period it is assigned to the job"? A. I am. The monthly rates are not subject to being used as hourly rates unless

proper allowance is taken of idle time when  
 § 919 the hourly rate is applied. There is no essential difference between the monthly rates in the equipment ownership expense schedule and the monthly rates in the Bureau of Reclamation sched-

ule. The difficulty arises when they divide those monthly rates by thirty for a daily rate, and by sixteen for an hourly rate and then apply that hourly rate only to the actual hours of operation. In doing so they make absolutely no allowance for idle time.

Mr. Ruddiman: That is all.

### Recross Examination

By Mr. Sweeney:

RXQ. 308. Tell His Honor please, if it is not a fact that the hourly rate provided by the Bureau is applicable only to equipment in use for a few hours per day on work under cost-plus contracts, and is intended to compensate for moving and setting up equipment for short-time jobs or for the actual time equipment is employed on intermittent work. Is it not a fact? A. The hourly rate used by the Bureau in computing what they claim was a proper allowance—

RXQ. 309. Just answer the question, please.

Commissioner Thompson: Answer Yes or No, and then go on, or can you answer that yes or no?

A. Would you read the question, please?

(Last question repeated by the reporter.)

A. I can't answer that yes or no because he is not specific as to what hourly rate provided  
920 by the Bureau.

RXQ. 310. Is that the only answer you wish to give to that question? A. No. I would like

to go on. The Bureau of Reclamation has provided an hourly rate in their rental schedule in which they have completely ignored in computing the allowance which they claim is due the contractor under Claim No. 17—

RXQ. 311. That is your interpretation or qualification to your answer. Tell His Honor, please, if it is not a fact it costs just as much to transport and set up equipment on a small job as it does for a big one. You have the same hauling charge, have you not, the same setting up charge if your job was ten thousand or ten million? A. You mean if the equipment is the same?

RXQ. 312: Yes, if the equipment is the same. A. And all other conditions are the same?

RXQ. 313. Assuming that fact. Then you would be paid more money than if you were paid on monthly rate, would not that be a fact? A. As a matter of fact, you don't get similar conditions between the large job and the small job, so it is difficult to make an answer to that question.

RXQ. 314. That is, you just don't want to answer that question directly. Tell His Honor, please, if it is not a fact that the work covered particularly by Claim 17 was performed under a continuous seasonal program. Answer that. A. That's right.

RXQ. 315. You have already testified that you operated some of this equipment on a two-shift per day basis. A. It was all operated on a—



RXQ. 316. "All operated"—A. I didn't get to finish my answer. It was all operated on a two-shift basis, with the exception of a Kohler light plant and possibly one or two very minor items of equipment.

RXQ. 317. Also tell His Honor, please, if it is not a fact that you conducted the job on a seven day per week operational period. A. When we could, yes.

RXQ. 318. That is, when seasonal conditions permitted you to carry on the work, isn't that right? A. When we could operate on a seven-day basis, we did.

RXQ. 319. You have already testified that all of your equipment except the light plants were used under the described two-shift program. A. That's right.

RXQ. 320. It is a fact, is it not, please, that some items of the equipment were used alternately on the work under claim Item 17, and on other parts of the contract not covered by Claim 17?

922 A. Some were.

Mr. Sweeney: That is all, Your Honor. Take the witness. That is all on Claim Item No. 17.

### Redirect Examination

By Mr. Ruddiman:

RDQ. 321. I call your attention to pages 197, 198 and 199 of Plaintiff's Exhibit C, which contains statements of costs pertaining to Claim Items 32,

33 and 34, respectively. Do you know who prepared the rates for equipment used in these statements?

A. Yes, I do.

RDQ. 322. You prepared them? A. I did.

RDQ. 323. Will you tell the Court how you arrived at these rates? A. These were rates which I figured would be fair rates for the ownership expense of the equipment in question, plus maintenance and fuel and lubricants rates for the work which the statements covered.

Mr. Ruddiman: That is all.

Mr. Sweeney: No cross, Your Honor please.

Mr. Shields: Your Honor, that concludes the plaintiff's testimony at Denver at this time.

Our very important engineering witness was engaged in war work and we could not get him.

923 Our plan is to have him in Washington suiting your convenience shortly after you return from the trip West.

Commissioner Thompson: All right..

Mr. Sweeney: May the record show, Your Honor please, that the defendant is also placed in the situation where its witnesses and field engineers are now fighting the Japanese in the Pacific. We will get them as soon as the war is over, with the blessings of God.

Commissioner Thompson: I will try and keep the testimony going as quickly as I can.

Mr. Shields: I might say if Mr. Sweeney will prepare and submit to me what he expects to prove by these witnesses, we may agree on it.

Mr. Sweeney: If Your Honor please, I would be delighted to do that, and that is my practice and custom on small cases, but, obviously, in this case it would be impossible to do it, though I would be glad to.

Mr. Shields: Before the hearing adjourns, I wonder if the Court will fix some time limit how long we will have to hold available for examination our records for the F.B.I. men. We have to pay storage—

Mr. Sweeney: If Your Honor please, this is a half-million-dollar lawsuit and at this time—

Commissioner Thompson: How long do you think it will take your F.B.I. men?

924 Mr. Sweeney: That is difficult for me to say, because Your Honor can observe there is a great deal of accounting to be done.

Mr. Shields: We prepared our data in three weeks.

Mr. Sweeney: You prepared your data all in three weeks?

Mr. Shields: And examined the data and made our figures from the data.

(Colloquy.)

Commissioner Thompson: I may fix a limit when I get back, but I am not going to fix one now.

Mr. Sweeney: Thank you.

Mr. Shields: Mr. Commissioner, I think it should be a matter of record that Exhibit H, the file of Order for Changes, is not here at this time. We

may have it in our records, and we will make every effort to duplicate it as quickly as possible.

Commissioner Thompson: Just make that as a matter of record.

(Whereupon, at the hour of 11:20 o'clock, a. m., the hearing was closed.)

\* \* \* \* \*

925

**C. E. Kasler**, a witness produced on behalf of the plaintiffs, having first been duly sworn by the Commissioner, was examined, and in answer  
926 to interrogatories, testified as follows:

#### Direct Examination

By Mr. Shields:

Q. 1. Please state your name, age, occupation and residence. A. My name is C. E. Kasler; age 42; occupation civil engineer; address 291 Lister Avenue, Oakland, California.

Q. 2. State whether or not you have an interest in the outcome of the pending litigation? A. I have no interest.

Q. 3. You state that you are a civil engineer. Will you please briefly tell the Court your educational background and practical training? A. I am a graduate engineer, University of Ohio, Athens, Ohio.

Q. 4. When did you graduate? A. In 1925.



Q. 5. And where have you been employed since your graduation? A. I worked for 16 years as project engineer and construction engineer for the State of Missouri. The last 4½ years I have been employed as district manager for the Western Contracting Corporation, Sioux City, Iowa, with headquarters at San Francisco.

Q. 6. State whether or not, in connection with the employments you have enumerated, you 927 have had experience in matters of large earth-moving projects? A. I have.

Q. 7. Does that include rock and similar material? A. Heavy grading excavations, foundations, rock excavations, classifications of excavations.

Q. 8. Embankments. A. Embankments.

Q. 9. What about what we call heavy construction such as building bridges and what not? A. The largest bridge was 3,000 feet across the Lake of the Ozarks, 80 feet of water.

Q. 10. What connection, if any, and over what periods, did you have with the work of building what is known as Vallecito Dam, by Martin Wunderlich Company, on the Pine River, Colorado? A. I spent two months at Vallecito Dam in 1938 and two weeks in 1941.

Q. 11. In what connection were you employed? A. Checking quantities and the classification of materials.

Q. 12. State whether or not, besides the time you were engaged at the site of the work, you put in any

time elsewhere in working up the data you collected  
 over the period you mentioned? A. This  
 928 data was worked up at nights at Jefferson  
 City, Missouri, while I was working as con-  
 struction engineer for the State of Missouri.

\* \* \* \* \*

### CLAIM 17.

#### Direct Examination

By Mr. Shields:

Q. 174. Next I invite your attention to item of  
 claim 17, cobblestone excavation and fill, statement  
 of which appears in the petition, pages 14-16 of the  
 printed record.

Have you made any study of the contract draw-  
 ings as showing the location of the borrow pits  
 contemplated to be used when the contract was  
 made? A. I have.

Q. 175. Contract drawing 191-D-45, being a part  
 of Plaintiff's Exhibit A, shows what with reference  
 to the location of borrow pits? A. It shows  
 961 borrow pit No. 1 on the right side of the  
 river, borrow pit No. 2 on the left side of the  
 river, and cobble borrow pit immediately down-  
 stream.

Q. 176. From what? A. From the axis of the  
 dam on the left side of the river.

Q. 177. State, if you know, whether or not any  
 cobbles were ever obtained from what is shown on

the drawing as the cobble borrow pit. A. There were no cobbles obtained from that borrow pit.

Mr. Sweeney: We object unless he saw and knows that of his own knowledge.

The Witness: I saw the dam location after the excavation. I saw that the cobble borrow pit was not disturbed.

Commissioner Evans: I think the testimony should be excluded.

Mr. Shields: He actually saw that this cobble pit area was never excavated at all.

Commissioner Evans: He didn't see the area before the work was done on it.

The Witness: I saw it after the dam was completed and it was never disturbed.

Mr. Shields: He knows no cobbles were taken from that area because it was never touched.

962 Mr. Sweeney: I understand the witness is testifying in support of the amounts plaintiff is claiming in this case. Defendant has made available to him data and he has made computations. He was only on the job from October 24, 1939 to December 18, 1939.

Commissioner Evans: The objection is overruled. The objection goes to the weight.

The Witness: Would you repeat the question?

By Mr. Shields:

Q. 178. I am asking whether or not, to your knowledge, any cobbles were ever obtained from the area shown on the drawing as the cobble pit

area? A. No cobbles were obtained from that area.

Q. 179. Was that area ever disturbed during the progress of the work? A. It was never disturbed.

Q. 180. Where, if you know from your own observations, were cobbles necessary for the work procured?

Mr. Sweeney: Objection.

Mr. Shields: I asked if he knows.

Commissioner Evans: Mr. Shields, suppose, in view of these objections, you change your questions to ask first if he knows, and he can answer that yes or no, and then establish how he knows, and then we will get his testimony.

By Mr. Shields:

963

Q. 180. When you were on the work, were cobbles being procured, and if so, from what source? A. They were being procured when I was first on the job in 1939 from the pit on the left side of the river, known as borrow pit No. 2.

Q. 181. How is that pit marked on the drawing? A. "Earth embankment borrow pit area".

Q. 182. And that is the pit you were talking about when you mentioned borrow pit No. 2? A. Yes.

Q. 183. What would you say as to the comparative distance the cobbles would have to be hauled from this pit labeled "earth embankment borrow pit" on the left side of the river, from which you have just said cobbles were being obtained in 1939 when you were there, to the embankment, with the distance cobbles would have to be hauled from the



area marked "cobble borrow pit" on the drawing to the embankment? A. If the distance is measured over the most feasible road, the pit actually used, from the center of mass of pit to center of mass of fill, is approximately 750 feet; whereas the distance from the cobble pit, shown as pit No. 3, from center of mass of pit to center of mass of fill, would be approximately 2,900 feet.

Q. 184. State whether, if you know, the area shown as "earth embankment borrow pit" on the drawing on the left side of the river was  
964 actually limited to the dimension shown on the drawing, or was it extended for a greater distance upstream than as shown? A. The final drawings indicate that borrow pit No. 2 was extended upstream a large distance.

Q. 185. Do you know how much farther, as the pit was extended, the haul would be to the dam embankment as compared to the haul from the cobble pit shown on the drawing? Have you made a calculation of that? A. My original calculation was from the pit as actually constructed.

Q. 186. As actually constructed? A. Yes.

Q. 187. And not as shown on the contract drawing? A. That is correct.

Q. 188. If it should develop that the contractor is entitled to overhaul not for the most feasible distance but for the distance measured on a straight line from center of mass to center of mass, what would be figured for the difference in haul from

borrow pit No. 2 and from the cobble pit shown on the drawing? A. The haul from borrow pit No. 2 would be 4,700 feet.

Q. 189. In a straight line? A. Yes. And from cobble pit No. 3 the haul would be 1,600 feet 965 in a straight line.

Q. 190. You state you were present when materials were being excavated from this pit No. 2 on the left side of the river from which cobbles were procured. What was your observation as to the character of material which was being obtained from this pit?

Mr. Sweeney: That is a question that goes directly to the question of whether this witness saw the material actually being excavated.

Mr. Shields: I asked if he was there when it was being excavated.

By Commissioner Evans:

Q. 191. You were there? A. Yes.

Commissioner Evans: All right. Go ahead.

A. The material was full of large cobbles, ranging from  $2\frac{1}{2}$  inches in diameter to 12 inches or better.

By Mr. Shields:

Q. 192. At that time, in the late autumn of 1939, how were the large stones being separated from the earth material in borrow pit No. 2? A. They were being separated by two rake dozers on the fill.

Q. 193. What is a rake dozer? A. A bulldozer in which slots have been cut to permit the earth to pass through the blade.

966 Q. 194. Do you mean that the materials as excavated would be dumped on the embankment and then the rake dozers would separate the stones from the earth? A. That is correct.

Q. 195. There is mention in other parts of the testimony about a screening plant. Was that screening plant in operation at that time? A. As I remember it, the screening plant was not used on these particular cobbles in 1939; that is, the cobbles from this particular pit.

Q. 196. Would or not a screening plant have operated in much the same fashion in separating stones from earth? A. The result would have been the same.

Mr. Shields: Incidentally, this Plaintiff's Exhibit 1-A, being the moving pictures taken while the work was in progress, about one-half of the film is an illustration of trucks dumping this material in 1939 into the fill and these dozers operating to separate the stones from the earth, so Your Honor, when you see it, will get a very good idea how they operated.

By Mr. Shields:

Q. 197. There is in evidence as Plaintiff's Exhibit 17-E a list of equipment allegedly used by the contractor in doing this work from pit No. 2 on the left side of the river, and of the rates of rental

alleged to be reasonable for the use of such equipment while so employed. I will ask you  
 967 whether you have examined this exhibit and what would you have to say as to whether or not the hourly rates fixed in the final column of this exhibit would accord with your observation and experience in use of similar equipment elsewhere?

Mr. Sweeney: We object. This witness has not been qualified to testify whether these hourly rates as claimed here would be fair and equitable, or whether the monthly rates applied by the contracting officer should be sustained.

Mr. Shields: I will reserve the question and ask this one:

Q. 198. I will ask you whether or not, over the period you were employed as project engineer and construction engineer for the State of Missouri, you had constant experience in using equipment such as is listed in Plaintiff's Exhibit 17-E? A. I did.

Q. 199. And whether or not you have had experience in fixing rates for such equipment? A. I have.

Q. 200. And whether or not, in the road work carried on by the State of Missouri, it was necessary to use equipment of the same character as used in the building of this dam? A. It was.

Q. 201. Based on that experience, would you be in position to express an opinion as to the reasonableness of the hourly rates fixed in Plaintiff's Exhibit 17-E? A. I am.  
 968



Q. 202. I will ask you if the rates so listed are reasonable, and give your reasons why?

Mr. Sweeney: We renew our objection. He has not indicated that conditions on this job and on the other jobs he is testifying about are comparable. There would have to be a reasonable similarity, I should think.

Commissioner Evans: You will have to carry on your examination some further to qualify him. Ask if he was familiar with equipment rental rates at that time and if the equipment is the same.

Mr. Shields: I have asked the latter. I have not asked as to time.

By Mr. Shields:

Q. 203. What would you say as to whether or not, at or about that time or immediately prior to or immediately after that time, you had experience in rental equipment of the same character? A. During the last ten years I was with the Highway Department of the State of Missouri I was a division construction engineer. At times it was not possible to get agreed prices from contractors, in which cases the work was done on a cost-plus basis. The same rates, the AGC rates, were used on this cost-plus basis. The type of equipment was identical to the type of equipment used at Vallecito Dam.

969 Commissioner Evans: All right. He may answer.

By Mr. Shields:

Q. 204. Was it during 1939 and 1940 that you had experience of this character? A. Between 1930 and 1939.

Q. 205. Now, coming back to my question, what would you say as to the reasonableness of the hourly rates shown by Plaintiffs' Exhibit 17-E?

A. I have examined Plaintiffs' Exhibit 17-E, and it is my opinion that the rates asked are reasonable, inasmuch as they include the equipment ownership rate specified in the AGC book, the Bureau of Reclamation Fuel Oil and Grease Rates, and a maintenance rate that includes the servicing of all equipment involved, also supplies, minor repair parts, etc.

Q. 206. I will ask you whether, if you know, it would be more or less expensive to operate in a high altitude such as here involved than in a low altitude such as you were accustomed to in Missouri work? A. It has been our experience that it costs much more to operate equipment in higher altitudes, the efficiency being cut down as much as 25 per cent, depending, of course, on the elevation at which the work is done.

Mr. Shields: That is all on 17.

(Short recess.)

970

CLAIM 17.

## Cross Examination

By Mr. Sweeney:

XQ. 207. Mr. Kasler, please, you told His Honor that you made a study of the contract drawings, in reference to one of the first questions by Brother Shields. Tell His Honor when you made this study? A. The original contract drawings?

XQ. 208. This study that you testified about, that you made a study of the contract drawings; when did you do that?

Mr. Shields: I didn't ask him whether he had studied the contract drawings. I asked if he had seen them.

Mr. Sweeney: I have a note that he asked whether the witness studied them.

Commissioner Evans: The witness can answer the question.

A. I have studied them from time to time but I don't remember when I first studied them.

By Mr. Sweeney:

XQ. 209. Regarding the computation you made for plaintiff in connection with this Claim 17, when did you do that? A. I made that computation yesterday.

XQ. 210. When did you make that, please? A. Yesterday.

XQ. 211. This computation that you have testified about, you made yesterday? A. That is  
971 right.

XQ. 212. With regard to the amount of money that the plaintiff is claiming under this item, of \$181,721.10, did you participate in the preparation of that computation? A. No, I did not.

XQ. 213. You didn't have anything to do with that? A. No.

XQ. 214. You testified you were on the job and you saw these cobbles being excavated from this particular pit. Were you referring to pit No. 1? A. No. I was referring to pit No. 2.

XQ. 215. It is a fact that a considerable quantity of cobbles were obtained from that pit during the time the excavation work was going on?

Mr. Shields: What pit?

Mr. Sweeney: The pit he has just mentioned, No. 2.

A. It is my understanding that all the cobbles that did not come from required excavation came from pit No. 2.

By Mr. Sweeney:

XQ. 216. From pit No. 2? A. Yes.

XQ. 217. Weren't you questioned regarding pit No. 3? A. Pit No. 3 I saw after the dam had been completed, and it had not been disturbed.

XQ. 218. You were testifying as to your  
972 interpretation of the drawing, and you testi-



fied that the ground surface was not disturbed at that particular location? A. At pit No. 3 it was not disturbed.

XQ. 219. Do you know as a fact that practically all the cobbles required on this job were taken from pit No. 2? A. I know all the cobbles except what came out of required excavation came from pit No. 2.

XQ. 220. Isn't it a fact if the contractor had not used those cobbles they would have been wasted and he would have been subjected to the expense of stripping and preparing this other cobble area? A. Not necessarily. The stripping was a pay item.

XQ. 221. But he would have had to clear it and do whatever work was involved? A. As I remember the pit, there was very little clearing required.

XQ. 222. It is quite an open area out there, isn't it? A. It isn't densely forested.

XQ. 223. Except on the higher elevations, where it is quite heavily wooded. He would have had to build an additional roadway, wouldn't he? A. That would have been a small item.

XQ. 224. A small item. You testified, in substance, that the separating or screening plant was not in operation when you were there in the fall of 1939? A. I said it was not used on pit  
973 No. 2.

XQ. 225. He was using the rake dozers? A. On the cobbles from pit No. 2, yes.

XQ. 226. That wasn't as efficient a means of doing that work as would have resulted from the

use of the screening plant, was it? A. I have not studied the cost. I don't know.

XQ. 227. Do you know whether or not the contractor experienced considerable trouble with his screening plant? A. At the time I was on the job nothing was said about trouble with the screening plant.

XQ. 228. It just was not working so far as you observed? A. I saw the plant in operation.

XQ. 229. Oh, it was in operation. Where was it at that time? A. It was located, as I remember it, downstream from the dam axis.

XQ. 230. In this borrow pit No. 2? A. No, sir.

XQ. 231. It was located somewhere else? A. The plant was stationary. The material was hauled to the plant.

XQ. 232. The material was hauled from borrow pit No. 2 to the plant? A. No. The material  
974 from borrow pit No. 2 was separated with rake dozers in 1939. The screening plant was used for other operations.

XQ. 233. Just limit it to this Claim 17. A. The screening plant was not used in 1939 to separate material from pit No. 2.

XQ. 234. You testified that the results from using the screening plant and from using the rake dozers were about the same. You don't mean you could accomplish this work as efficiently by using rake dozers as by using the screening plant? A. The results must have been satisfactory or the Government would not have permitted it.

XQ. 235. You have been called as an expert. On the other jobs you have been on, did they use a screening plant rather than rake dozers? A. We have used both.

XQ. 236. But in this instance, where they were encountering a large number of cobblestones, would you have used a screening plant? A. I understand they used it for some of the operations.

XQ. 237. You were not there? A. No.

XQ. 238. You don't know? A. No.

975 XQ. 239. In respect to rates, you made reference to AGC rates. Do you know that Bureau of Reclamation rates are also based on AGC rates? A. I understand they are.

XQ. 240. So that the only difference is that the plaintiff is claiming compensation based on an hourly rate and the contracting officer made an adjustment based on use of the equipment for a monthly period; is that not the difference, if you know? A. I have studied the contractor's method of computing the rates and it is my opinion that his method is proper for this particular job.

XQ. 241. Tell His Honor if it isn't a fact that this work, so far as you know, was carried on continuously; that is, it was a seasonal job; it was carried on in all seasons, was it not? A. As far as weather would permit.

XQ. 242. So far as weather conditions were favorable, the work progressed continuously? A. That is my understanding.

XQ. 243. You don't mean to say, as an expert, you would apply the same rates in computing a job of that kind as in computing a job where you did the work in a week or two weeks and were subjected to the payment of high rates in getting the equipment on the job? A. We have always  
 976 computed rates from the time the machine arrived on the job until it left the job, or, in this particular instance, from the time the machine was assigned to that part of the work, and when it was idle on Sundays the rate went on.

XQ. 244. That is, in conformity with the AGC formula? A. That is the method of computing rates.

XQ. 245. Assuming you were asked to do a comparatively small earth-moving job where the work could be completed in a week or ten days, and assuming also that you were contracting to do a job that might be carried on for four working seasons or four years, would you charge the same rental rate for both jobs? A: I would charge from the time it arrived on the job until it left.

XQ. 246. The question is whether or not you would use the same rental rate for both jobs. Isn't it a fact that for a small job you would charge an hourly rate, whereas for a large job you would charge a monthly rate? A. No; whether a small or a large job you would still use this book as a guide.

XQ. 247. You testified it was more expensive to operate this equipment in a high altitude. Was the altitude where this work was done so high that it



would have affected materially the efficiency of the operation of the equipment on the job? A.

977 That is correct.

XQ. 248. It was about 7200 feet, was it not? A. Equipment companies claim from 2 to 3 per cent loss of efficiency per 1000 feet of elevation. This elevation was 7200 feet, approximately.

XQ. 249. That wasn't unusually high, was it? Weather conditions were comparatively favorable, weren't they, when you could work along late in December? You testified you were on the job until December 18, 1939. A. I wouldn't want to build a dam at a higher altitude than this, because it would take special equipment.

XQ. 250. If you were operating in the Rockies, 10,000 or 12,000 feet, that would be much less efficient than operating at this altitude? A. I think the loss of efficiency would be about 2 per cent per 1000 feet.

XQ. 251. And that is the only variation, is it? That is all.

\* \* \* \* \*

1017 Direct Examination

By Mr. Sweeney:

Q. 1. State your full name. A. Jean R. Walton.

Q. 2. Your address? A. Kingman, Arizona.

Q. 3. Your present position? A. I am field engineer on the Davis Dam.

Q. 4. Where is that located, please? A. Davis Dam is on the Colorado River, between the states of Arizona and Nevada, approximately 60 miles below Boulder Dam.

Q. 5. Please tell us briefly your educational background. A. I have graduated from high school and have a degree in electrical engineering from the University of New Mexico, graduated there in 1933.

Q. 6. Now, will you indicate, please, in some detail, your practical experience? A. Previous to the time of going to University, I was out of 1018 school for about approximately six years from the time I finished high school 'til I entered University. During that time I was working for the Santa Fe Railroad. I served a four-year apprenticeship as machinist for Santa Fe Railroad. Worked one year as machinist at San Bernardino, California. Worked approximately another year in the signal department, installed block signals. Following that I went back to University. I was then in school from 1929 to June of 1933.

Very shortly after graduating from University, possibly a couple of months later, I went to work for the United States Indian Irrigation Service at Albuquerque, New Mexico. I worked for the United States Indian Irrigation Service on small irrigation and power projects up until 1936, about September; I believe it was a little later than that, probably latter part of October, I was transferred

to the Bureau of Reclamation, and I have been employed by the Bureau of Reclamation mostly on Valecito Dam up until the time I went into the Army.

Q. 7. When was that, please? A. I went into the Army the latter part of July. I believe my service started on the first of August, 1942.

Q. 8. And released sometime in 1946? A. My terminal leave April 27, 1946.

\* \* \* \* \*

1049 By Mr. Sweeney:

Q. 75. I show you a document marked Defendant's Exhibit C.

(Whereupon, a paper was marked for identification Defendant's Exhibit C.)

Q. 76. (Continuing) Examine it, please, and tell his Honor what it is. Now, tell his Honor, please, what this drawing is and describe it in some detail.

A. Exhibit C is a contact print of drawing 191-D-45, which is contained in the specification 705. It forms a part of the contract.

Q. 77. In other words, it forms a part of the contract? A. That's right. This drawing indicates the general location of earth embankment borrow pits and cobble borrow pit area, also general location of the dam, and has the logs of the test pits and auger holes in the borrow pit and cobble borrow areas, shown thereon.

1050 Q. 78. Now, by reference to that drawing, will you indicate to His Honor the location of what

was called earth borrow pit No. 1? A. Earth—which is later referred to as earth embankment borrow pit No. 1, is the area indicated on the right side of the river. In other words, the river is flowing from left to right. It is in the lower portion of the main drawing.

Q. 79. For the record, will you outline that in pencil, please?

Mr. Sweeney: For the record, the witness has now outlined borrow pit No. 1 and has marked it for the record as borrow pit 1 and his initials.

By Mr. Sweeney:

Q. 80. Now, at this point, will you indicate to His Honor the general location of what later became borrow pit No. 2? A. Borrow pit No. 2 is the borrow pit indicated on the left side of the river.

Q. 81. Will you outline that, please, and mark it borrow pit No. 2?

Commissioner Evans: Isn't it already outlined?

The Witness: Correct.

Commissioner Evans: And isn't that true of No.

1?

The Witness: As outlined in the specification drawings.

Commissioner Evans: Isn't that true also of No. 1?

Mr. Sweeney: All right. That was already shown, the location of borrow pit No. 1. Please mark the location of borrow pit 2 and mark your initials thereon.



For the record, your Honor please, my brother on the opposite side is questioning the designation of the borrow pits on the drawing; and for the purposes of identification we want the record to show the exact location of borrow pit 2. We have asked that it be so marked. Those comments, your Honor please, apply with respect to borrow pit No. 1.

By Mr. Sweeney:

Q. 82. By reference to Defendant's Exhibit C, will you please indicate to His Honor and outline in pencil the location of the cobble borrow pit area.

A. The cobble borrow pit area is marked on the plan. It is a dotted line downstream from this area.

Commissioner Evans: It bears the marking "cobble pit area"?

The Witness: That is right.

By Mr. Shields:

Q. 83. While we are on that, was the cobble pit ever used for any purpose? A. There was some earth materials taken out of there in small quantity in the latter part of 1941 to complete the 1052' embankment.

By Mr. Sweeney:

Q. 84. And will you tell His Honor, please, the purpose of that and why it was necessary. A. The contractor had stockpiled sufficient material in a ramp at the left abutment of the dam to complete

the earth embankment of the dam. They were so late and slow in getting started with their operations in 1941 that the reservoir elevation came up and flooded out a portion of this material. It, therefore, became necessary to go to some other location to get material to keep the dam in earth and cobble.

In order to do this the only spot available was a cobble borrow pit, approximately five or six thousand yards taken from this pit.

Q. 85. To the best of your knowledge, Mr. Walton, was any cobble taken from that pit? A. An effort was made to leave all the rock and stones in the pit, because the rock was not needed. We had sufficient rock already on the downstream slope of the dam to keep it; but there was some rock, and what there was was removed in accordance with the specifications before it was rolled, and these were kicked over into the cobble fill.

Mr. Sweeney: That testimony was a little out of order, but it was deemed necessary by a question injected by plaintiff.

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1061 Commissioner Evans: I understand the exhibit is offered for a limited purpose. The objection is overruled and the document is received.

(The map above referred to, marked Defendant's Exhibit C, is filed in connection with this case.)

\* \* \* \* \*

1068 Mr. Sweeney: Your Honor, before offering the documents in connection with the general case, there are just a few questions I wish to ask Mr. Walton.

Direct Examination

By Mr. Sweeney:

Q. 120. Mr. Walton, I believe I omitted to ask you just what duties you performed during this whole job? A. The construction of Vallecito Dam?

Q. 121. Yes. A. I was field engineer and chief earth work inspector.

Q. 122. After the job was completed in 1941, what did you do in connection with this case after that time? A. When the job at Vallecito was completed, I was transferred to the Denver office and was in the concrete dam design section. Along about possibly July or a little earlier than that, possibly in June, 1942, I spent possibly a month or a little longer in preparing memorandums and data and information relative to the various claims  
1069 the contractor had submitted, to be used in the preparation of findings of fact by the contracting officer.

Q. 123. Following that period you went into the Service sometime? A. I went into the Service August 4, 1942.

Q. 124. Now, with respect to sometime in 1946 and following your release from the Service in 1946, what did you do in connection with this case and when? A. When I returned to work with the

Bureau of Reclamation the 18th of February, 1946, I was assigned to duties here in the Denver office examining all the files and records and preparing data for the defense of this case. I was here in Denver until approximately the middle of May, until I was transferred to Davis Dam where I am at the present time.

Q. 125. During that time you selected the papers and so forth, and did whatever was necessary to aid government counsel in the defense of this suit?

A. Examined all the government records and photographs and drawings in connection with the construction of Vallecito Dam, and selected anything that pertained in any way to various items of claim; and I assembled this data.

\* \* \* \* \*

1073 By Mr. Sweeney:

Q. 132. We show you a document marked Defendant's Exhibit G.

(Whereupon, a book was marked for identification, Defendant's Exhibit G.)

1074 Q. 133. (Continuing) Tell his Honor what it is, please. A. Exhibit G is an equipment rental schedule prepared by the Denver office of the Bureau of Reclamation, dated September 21, 1937. It contains various items of equipment and rental rates as computed in the Denver office.

Q. 134. Tell his Honor, please; what is the purpose of that document? What is it used for in connection with the work on this job? A. This docu-



ment submitted to all field offices and used as a basis to establish equitable rental rates and orders for changes where the rental equipment is involved.

Mr. Sweeney: This document, if your Honor please, is offered as Defendant's Exhibit G for the purpose of showing the rental rates that the defendant's representatives and engineers on the job were required to use with extra work changes.

Mr. Shields: Plaintiff objects to this document as not shown to have been in effect when the work went on. It is a subsequent rental rate promulgated by the Bureau.

By Commissioner Evans:

Q. 135. What is the date of it? A. 1937.

Mr. Sweeney: The contract, your Honor, is dated March 14, 1918.

Commissioner Evans: What?

1075 Mr. Sweeney: March 14, 1918; and these are promulgated in 1937.

Commissioner Evans: You are off 20 years.

Mr. Sweeney: Pardon me. 1938.

Commissioner Evans: I don't understand your objection on the date.

Mr. Shields: My objection is that there was a subsequent rental schedule that did apply.

Commissioner Evans: Oh, there was a later one?

Mr. Shields: Yes.

By Mr. Sweeney:

Q. 136. Tell his Honor, please, at the start of this job, when what you have told us the work began, in

April, 1938, in connection with which orders and extra work and claims in connection therewith, just what, if anything, did this publication have to do with such matters? A. This rental schedule was submitted to the field offices. I can't say the exact date we received it at Vallecito, but this was later revised and supplemented and there is a later dated schedule that includes the data that is in here plus an enlargement.

By Mr. Shields:

Q. 137. Do you know whether a copy of this was furnished to this contractor or whether he ever had any knowledge of its existence? A I don't  
1076 know that these were furnished to any contractors. They were for guides for Bureau of Reclamation field forces.

By Mr. Sweeney:

Q. 138. In this connection, we show you a copy of Plaintiff's Exhibit 3. Is that the revised publication of the rental rates you refer to? A. Yes, this is the later, enlarged copy.

Q. 139. That is, it is a revision of the defendant's exhibit—A. That's right.

Q. 140. —G, for identification, that is being offered? A. That is correct. I thought there was a reference in here, but I guess there isn't.

Pardon me. It is stated right on here. It says this schedule supercedes the schedule of this office under date of September 21, 1937.

Q. 141. And is the publication that you have just referred to in 1937 Defendant's Exhibit G? A. It is.

Q. 142. —for identification? A. It is the equipment rental schedule dated September 21, 1937, is Defendant's Exhibit G.

Q. 143. Now, with respect to any claim for additional compensation in connection with alleged extra work prior to the publication of the revised equipment rates, dated January 2, 1940, just what rates would you use on that job in connection with the work under the contract?

Mr. Shields: I object. Not what he would use.

Mr. Sweeney: Your Honor please, we are trying to lay the groundwork of what was used. Obviously, the contractor couldn't have used that.

Commissioner. Evans: I will overrule the objection until—

The Witness: This would have formed the basis for any rentals that were worked up in the case. That is what was figured to be a reasonable rental for equipment.

By Mr. Sweeney:

Q. 144. Who would do this figuring on the job?

A. Well, it could have been any of the engineers on the job. As a general rule at Vallecito, I think I handled most of it.

Q. 144. And these are the rental rates? A. Until the schedule came out.

Q. 145. Now, with respect to Plaintiff's Exhibit 3, do you know of your own personal knowledge

whether that was officially submitted to the contractor? A. Not to my knowledge. I don't think it was. In fact, I don't think it was put out to be submitted to the contractor. It was put out for 1078 the guidance of the employees of the Bureau of Reclamation in figuring a reasonable rental allowance.

Q. 146. But in case a contractor asked for it, it would be given to him? Is that correct? A. He could observe anything that was in there. I think we had one copy of that on the job

By Commissioner Evans:

Q. 147. Was the same thing true of the 1937 schedule? It could be available on request? A. Oh, yes. If they wanted, they could see it was a reasonable rental rate.

By Mr. Sweeney:

Q. 148. Mr. Walton, please, with respect to the various items of claim in this suit, other than item No. 17, to which we understand the so-called 1940 rates applied, now, just what rental rates would have been used in connection with the various other claims other than 17? A. Well, any date submitted previous to 17 or previous to the date the revision, this copy would have been used.

Q. 149. And that is Defendant's Exhibit G, the 1937 rates? A. That's right.

Mr. Sweeney: This document, your Honor please, is now offered as Defendant's Exhibit G. The pur-



pose is to show to the Court the rental rates defendants were required to use in connection with  
 1079 any items of claim other than No. 17.

Mr. Shields: Plaintiff objects to it on the double ground that it is in duplication of an exhibit already in evidence; that the contractor never knew of the existence of this Defendant's Exhibit G until today, never had it applied to any claim to his knowledge.

Commissioner Evans: Off the record a moment.

(Whereupon, there was unrecorded discussion.)

Commissioner Evans: I should like to have on the record a statement by you as to the purpose. Is that on the record?

Mr. Sweeney: That is on the record, and then I was going to call attention to the provisions of the specification in which the contractor was to make a reasonable allowance, and then how that was reasonable.

Commissioner Evans: All right. Let the record show the objection is overruled.

Mr. Sweeney: Now, your Honor please, in connection with that, may we show that under the terms of Paragraph 10 of the specifications of record 50 relating to extras, the contracting officer is to make a reasonable allowance for the use of the contractor's plant and equipment where required, to be agreed upon in writing before the work is begun, but in no case is it to include allow-  
 1080 -ance for office expenses, general superintendent, or other expenses.

The document which we are now offering, if your Honor please, as Defendant's Exhibit G, is the equipment rental schedule in effect September 21, 1937, by the Bureau of Reclamation. And, in the very first page thereof it states, quote, "In preparing extra work orders under construction contracts on the basis of payment at cost plus, it is a requirement, set out in Paragraph 10 of the specifications, that reasonable allowances be made for the use of the necessary equipment and that such allowances must be agreed to in advance and should be stated in the order."

I don't believe it is necessary to read further. Reference is made to the Associated General Contractors of America, in quotes, "equipment ownership expense," dated 1930.

Commissioner Evans: For my further information, which one of these claims involved which orders?

Mr. Sweeney: Practically all of these claims involve extra change orders.

Commissioner Evans: Yes.

By Mr. Sweeney:

Q. 150. Tell his Honor, please, in connection with the claims presented under this suit, just in what manner would you determine the fairness or equitableness—

Mr. Shields: Oh, I don't think Mr.  
1081 Sweeney will ever get through. This man is not the contracting officer.

Commissioner Evans: I think that is right.

Mr. Sweeney: Before the contracting officer could do anything, the witness on the stand, employed by the government, is the one in the first instance to make that, and he submitted that to the contracting officer.

Commissioner Evans: All right.

By Mr. Sweeney:

Q. 151. First, tell his Honor, please, what you did with the claims presented in this suit, Mr. Walton. A. Well, any claims submitted by the contractor that involved equipment rental, in other words, an allowance for his equipment, we merely took the schedule as furnished by the contracting officer and made a comparison of what was figured based on this schedule, what was an equitable rental, and showed that in comparison with what the contractor was submitting in his statement of claims. That was put up to the contracting officer. The basis of that was this equipment rental schedule.

Q. 152. Now, before the contracting officer made any determination on this claim or any claim, what did he do?

Mr. Shields: Oh, the contracting officer will best testify about what he did.

Mr. Sweeney: The contracting officer is not here, your Honor. He has retired, too.

1082

By Commissioner Evans:

Q. 153. Do you know the procedure of the contracting officer? A. Pardon me?

Q. 154. Do you know those procedures? A. If a contractor presents a claim?

Q. 155. Yes. A. Yes.

Commissioner Evans: All right. The objection is overruled.

The Witness: The contracting officer of the claim would be submitted to the contracting officer's representative on the project, and the construction engineer would make an analysis of the claim submitted and submit it to the contracting officer with his comments and recommendations.

By Mr. Sweeney:

Q. 156. Tell his Honor was that done in connection with each of the claims in this suit including 17? A. I think it was done in connection with all claims in this suit, and there is a mass of correspondence relative to conferences that were held in an effort to reach an equitable adjustment in each item claimed.

Q. 157. Now, with respect to the procedure you have just told his Honor about, and in connection with each of the claims presented, what did you yourself have to do in connection with them?

1083 A. As one of the field engineers I was directly in contact with the job. It was usually my duty in case a claim was submitted by the contrac-



tor to prepare a memorandum for the construction engineer stating that all the facts I knew relative to the contractor's claim. In many of these I prepared a schedule based on the hours shown, the various equipment hours of operation, what the claim would have amounted to based on Bureau of Reclamation rental rates rather than rates the contractor had used.

Q. 158. And did you do that in connection with each of the claims in this suit that involved the application of such rental rates? A. I did in, I would say, in most of these; possibly in all of them.

Q. 159. Well, so far as they involved the application of rental rates, Mr. Walton? A. In most cases that is right, I did.

Mr. Sweeney: This document is now offered, your Honor please.

Mr. Shields: You have offered it, and it has been admitted sometime ago.

Commissioner Evans: Defendant's Exhibit G was admitted back somewhere.

(Whereupon, a paper was marked for identification Defendant's Exhibit H.)

\* \* \* \* \*

1090 (Whereupon, a paper was marked for identification, Defendant's Exhibit K.)

Mr. Sweeney: Your Honor please, we offer as Defendant's Exhibit K a certified copy of a letter dated February 22, 1943, from the chief engineer,

that is, the contracting officer in Denver, to the Commissioner regarding the contractor's appeal from the contracting officer's findings of fact  
 1091 in this case.

Mr. Shields: Same objection as to the previous exhibit. It is an interdepartmental communication, never brought to the attention of the plaintiff.

Mr. Sweeney: And we cite the McCoy case again. Business just couldn't be done if the contracting officer personally had to do everything.

Commissioner Evans: Who is this from? Is it from the contracting officer?

Mr. Sweeney: This is from the contracting officer, if your Honor please, to the Commissioner in Washington explaining what he has done in connection with certain items in this defendant's exhibit. I will show it to you. (Handing paper to Commissioner Evans.)

Commissioner Evans: Who is the contracting officer, please?

Mr. Sweeney: Mr. Harper, if your Honor please.

Commissioner Evans: What is his official title?

Mr. Shields: Harper was the contracting officer. The Commissioner didn't have any more to do with it than I had, if your Honor please.

Commissioner Evans: If you want to withhold that and bring in a copy of this McCoy case in the morning, I will reserve ruling.

Mr. Sweeney: All right.

Commissioner Evans: Let the offer remain, but I shall reserve ruling until in the morning.

Mr. Sweeney: Yes, sir. And I will bring in the McCoy case. Off the record, please.

(Whereupon, there was unrecorded discussion.)

(Whereupon, a paper was marked for identification, Defendant's Exhibit L.)

Mr. Sweeney: We next offer in evidence, your Honor please, a document marked Defendant's Exhibit L, which is a letter dated March 13, 1942. It is a copy of a letter, and it is signed with the original signature of the plaintiff forwarding his final estimate together with the release executed by him wherein he reserves his rights. We are just putting in this letter to show the date the contractor made his final estimate.

Mr. Shields: No objection, except it is already in evidence.

Commissioner Evans: So received.

(The letter referred to, marked Defendant's Exhibit L, is filed in connection with this case.)

Mr. Sweeney: We next offer in evidence, your Honor please, a document marked Defendant's Exhibit M, purporting to be a copy of a letter dated July, 1942, from the contracting officer to the plaintiff. It is asking for some supporting data in connection with the claims.

Mr. Shields: No objection, except it is 1093 already in evidence.

Commissioner Evans: So received.

(The letter referred to, marked Defendant's Exhibit M, is filed in connection with this case.)

(Whereupon, a document was marked for identification Defendant's Exhibit N.)

Mr. Sweeney: We next offer in evidence, your Honor please, a document marked Defendant's Exhibit N, which is a certified copy of all of the vouchers and related papers including the final release and the acceptance notice by the plaintiff. It is from the official files of the general accounting office. It consists of 156 pages.

Mr. Shields: It is already in evidence as Plaintiff's Exhibit F.

Mr. Sweeney: It is offered, your Honor please, in order that there may be a complete record.

Commissioner Evans: Are you entering an objection?

Mr. Shields: No objection, except it is already in evidence.

Commissioner Evans: Very well. Let it be received subject to the provision that it be checked and the record clarified.

(The document referred to, marked Defendant's Exhibit N, is filed in connection with this case.)

\* \* \* \* \*



1116 Mr. Sweeney: If your Honor please, may I note on the record that the contracting officer that is the successor to Mr. Harper, whose name is Mr. Young, the chief engineer in Denver, was in Washington yesterday and he is today. We understand that he will return Friday morning. When he does we will call him as one of our main witnesses. In fact, it was our intention to call him as our main witness but it was impossible for us to do that yesterday. That is Mr. Young, the contracting officer.

If your Honor please, before we proceed to offer proofs in defense of Item No. 1, I believe there are just a few preliminary questions that I should touch upon this morning.

One of them relates to the issue regarding the admissibility of evidence, all communications and reports that were made during the progress  
1117 of the job. I believe yesterday we mentioned the McCoy case in 193 U. S. at Page 593, which supports the rule that official reports and certificates made contemporaneously with the facts stated, and in the regular course of official duty, by an officer having personal knowledge of them, are admissible for the purpose of proving such facts.

And in that connection we wish to call your Honor's attention to the case of Charles Rosser vs. The United States, in 46 Court of Claims, 190 to 196, and, only so far as pertinent, the Justice speaking for the Court said: "The evidence in the record consists entirely of official letters, communications, orders, and reports, competent as held in United

States vs. McCoy, 193 U. S. 593. The findings of the Court are predicated thereon."

We simply wanted to call your Honor's attention, please, to the fact that in connection with each and every one of the claims that are involved in the suit such communications and reports will be offered by the defendant, and we respectfully ask your Honor to consider our motion to offer such records in the light of these decisions.

Mr. Shields: Your Honor, I have not read the cases my friend refers to lately, but it has never been held, for instance, say: Mr. Wunderlich's superintendent sits down today and writes him a letter—that that would be admissible as  
1118 proving facts if the superintendent were available to testify as to what were the facts.

Now, my friend wants to put in a lot of letters that the man on the job writes his Chief in Denver, in exactly the same fashion. The man on the job is or should be available to testify as to the facts. We certainly are not bound by statements in a letter that never came to our attention. We had no means of refuting, disputing, or questioning it. So we object to any letter of that kind.

Moreover, they are not contemporaneous with the facts as they happened. Some of them were a year or two later.

(Further argument and discussion was had off the record.)

(Short recess.)

Commissioner Evans: Let the record show with respect to the document offered by defendant as its exhibit K, on which ruling was reserved, that the objection is sustained, inasmuch as I do not believe it admissible under this statute.

(Defendant's Exhibit K, heretofore marked for identification is filed in connection with this case.)

Mr. Sweeney: And may the record, if your Honor please, note an exception, on the ground, if your Honor please, that this evidences the action of the contracting officer and it is submitted to the Commissioner for transmission to the head of the department on which the administrative findings were made which are in evidence as Plaintiff's Exhibit E.

\* \* \* \* \*

1169 By Mr. Sweeney:

Q. 303. Now, referring, please, to the drawing attached to Defendant's Exhibit F, marked 191-D-45, you have mentioned to his Honor that materials were taken from borrow pit No. 2. Now, will you mark on this drawing, please, just in rough outline, the location of borrow pit No. 2? A. You mean the materials that were taken out later?

Q. 304. At a later date? A. After these claims?

Q. 305. Just show his Honor the location of borrow pit No. 2 on the drawing, made a part of the specifications. A. The portion of earth embankment borrow pit No. 2 as shown on drawing 191-D-45 from which Zone 1 and 3

materials were taken, from the left hand side of the river after this material that is involved in Claim No. 1 was excavated, to which I have referred—I will roughly indicate that with a circle and mark it "Pit 2."

Q. 306. Circle it and mark it "Pit 2," the portion of Pit 2. A. This is merely a small part of pit No. 2 from which this excavation came in 1939.

(Conference off the record.)

Commissioner Evans: Let the witness state what he has done. A. I have circled an area on the left side of the Pine River and marked it "Excavation from borrow pit No. 2 in 1939," and initialed it. This roughly outlines the portion of borrow pit No. 2 shown on the specification drawing as "earth embankment borrow pit area," from which this excavation was taken in the latter part of 1939.

By Mr. Sweeney:

Q. 307. And will you enter on this drawing, please, the location of borrow pit No. 1 that has been discussed and mark it "No. 1"? A. Borrow pit No. 1 as I have discussed it covers everything on the right hand side of the river as I am speaking of it now. I have circled in a large area 1171 here in pen, noted on here "Earth borrow pit No. 1" which is on the right side of the Pine River, and initialed it.

Q. 308. Tell the Court, please, if the outlines of borrow pit No. 2 are also shown on this same draw-



ing as it was made a part of the original specifications. A. Shown on drawing 191-D-45 specification drawing is a dashed line outlining a borrow pit on the right side of the river and earth embankment borrow pit on the right side of the river and an earth embankment borrow pit area on the left side of the river. These dashed lines indicate roughly the proposed area.

Q. 309. Just mark No. 2 area on the drawing, please, so that the Court will know its location. A. Actually area No. 2 was taken from a much larger area than what is indicated right here.

Q. 310. Indicate just so the Court will have a clear picture of where borrow pit No. 2 was. A. I have indicated on drawing 191-D-45 with an inked dashed line the approximate area covered by earth borrow pit No. 2. I have labeled this "Earth borrow pit No. 2." and it is initialed.

\* \* \* \* \*

1242 **Herman F. Bahmeier**, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

Direct Examination on CLAIM No. 1

By Mr. Sweeney:

Q. 1. State your name, please, Mr. Bahmeier. A. Herman F. Bahmeier.

Q. 2. And your address? A. Kingman, Arizona.

Q. 3. You are employed by the United States?  
A. I am.

Q. 4. Tell his Honor, please, what your present position is. A. My present position is construction engineer at the Davis Dam project.

Q. 5. And what is the Davis Dam project, please?  
A. Briefly, the Davis Dam project is a power dam, at least an earth and rockfilled dam, being built on the Colorado River including a large power plant, the location of which is about 67 miles downstream from Boulder Dam.

Q. 6. How does that job compare with the job involved in this suit? A. On the basis of quantities, the embankment, the earth and rock fill, would be about a million yards larger than Vallecito Dam. In addition to that, there is a large power plant which will contain in the neighborhood of about a half a million cubic yards.

Q. 7. As regards price of moving—

Mr. Shields: I object to this as irrelevant.

Commissioner Evans: Just a moment. Let us have the question then we will hear the objection.

Mr. Sweeney: I am just seeking to qualify this witness.

Mr. Shields: I admit his qualifications.

Mr. Sweeney: You admit his qualifications? That is sufficient.

Commissioner Evans: Very well, proceed.

\* \* \* \* \*

1486 **Milton E. Trenam**, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

Direct Examination on CLAIM No. 14

By Mr. Sweeney:

Q. 1. State your full name for the record, please.

A. Milton E. Trenam.

Q. 2. And your address, please? A. 1219 Locust, Denver.

Q. 3. And you are employed by the Department and perform your duties in the office of the Bureau of Reclamation, Denver? A. Yes, sir.

Q. 4. With respect to the contract in suit, tell his Honor, please, what your duties were at the job site? A. I was office engineer.

\* \* \* \* \*

1510 Mr. Sweeney: Your Honor please, referring to Claim No. 17, as indicated just before we recessed, I am going to ask Mr. Bahmeier concerning certain of these claims.

**Herman F. Bahmeier**, returned to the witness stand, having been previously sworn, and testified as follows:

Direct Examination on CLAIM No. 17

By Mr. Sweeney:

Q. 96. First, with respect to Claim 17, I am referring to a conference on March 29, 1948, with the contractor's superintendent, Mr. Stewart.

Tell his Honor, please, did you discuss with Mr. Stewart the plan for operation of borrow pit No. 2 for the 1940 season? A. I did.

Q. 97. Tell his Honor the facts regarding that. A. Prior to the initiation of operations in the 1940 season, I made a field inspection trip with Mr. Jean Walton, field engineer, and Mr. Stewart, the contractor's superintendent.

I will strike that out, please. I am confused on the next day. There are two days in there.

Mr. Shields: Just a little louder, Mr. Bahmeier, please.

The Witness: Yes, sorry.

1511 A. (Continuing) On the dates referred to, March 29, Mr. Walton, field engineer, and I had a discussion with Mr. Stewart, superintendent for the contractor, at which we reviewed in considerable detail the contractor's plan of operation of this borrow pit No. 2 for the 1940 season.

Mr. Stewart advised us at that time where he planned to place the screening plant, locating it at the downstream end of the pit.

I recall quite distinctly we advised Mr. Stewart that it was the contractor's responsibility where the screening plant was located, and, therefore, we were, of course, not raising any objection to where he was placing it. We did call his attention, however, to the requirements of the specifications that it was the contractor's responsibility to remove all rock having dimensions greater than five inches,



which, of course, is well known as a specification requirement.

I think I already referred to that, however.

At that same conference, or discussion we will call it, we advised Mr. Stewart the approximate quantities that would be required to complete the various zones of the embankment and the estimated yardage of the various types of materials that were available in this borrow pit No. 2, which had been determined by extensive explorations.

And I won't touch on that any further, because that will be covered very extensively by 1512 other witnesses later on.

By Mr. Sweeney:

Q. 98. Now, tell his Honor, please, to your personal knowledge, did the defendant submit to the plaintiff logs of all test pits excavated by it in borrow pit No. 2 with a map showing the location of each area and zone of the embankment for which each of the materials were suitable? A. Yes, we did furnish the contractor. I think it was early in April or a few days later from this discussion with Mr. Stewart. We furnished a drawing showing the logs of the pits in the various areas outlined in the drawing where different types of material were located. We also made an inspection of the borrow pit No. 2. This was early in April. Mr. Burns, Mr. Walton, and myself accompanied Mr. Wunderlich and Mr. Stewart over the entire area of borrow pit No. 2. We examined the open test pits and further

discussed the proposed plan of the operation of the pit for the 1940 construction season.

The contractor was again advised, Mr. Wunderlich in this instance, of the various types of material in the pit; and, at that conference, if I recall correctly, there was no discussion as to how the contractor—what method the contractor would use in removing the oversized rock. We had previously discussed it with Mr. Stewart, and it was not mentioned to Mr. Wunderlich at that time.

1513 Q. 99. Now, please, referring to a conference in Denver on June 6, 1940, between the Bureau's representatives and the contractor, tell his Honor, please, just what took place at that conference to your personal knowledge regarding this claim. A. This will have to be entirely from memory, because I don't have before me a copy of the report of this conference.

I did attend the conference in the Denver office, as I recall, June 6, 1940.

Q. 100. You did make a written report later of the results, didn't you? A. No, I didn't write the report. I did attend the conference. I didn't write a report. I attended the conference June 6, 7, and 8.

Q. 101. And this conference was called particularly to discuss the operations in borrow pit No. 2? A. There may have been other claims touched upon, but my memory doesn't serve me correctly in that.

I do recall, however, that it was at that time that the contractor was—there was two—there was two proposals, as I recall it, made to the contractor at

that time, two alternates, I will put it that way. One was that an area, as I recall, area No. 1, in the lower end of the pit would be set up as a cobble pit to the extent of some 250,000 yards; and the reason this area was picked was because it had a higher percentage of cobbles than the other areas in the pit.

1514 The price to be—I neglected to say, I don't know whether I did or not, but I will put it in now. Mr. Wunderlich was at this conference. I can't recall who else was there. The contractor was offered, as I say, to set up area No. 1 in borrow pit No. 2 as cobble pit to the extent of 250,000 yards, the contractor to be paid the cobble borrow pit price, as I recall, of 35 cents. I believe that is correct, 35 cents per cubic yard. That is item No. 9?

Mr. Shields: That is right.

A. (Continuing) Correct? Thank you.

Also, at this conference another proposal was made to Mr. Wunderlich. We called it an alternate which would include additional payment of four cents per cubic yard for an estimated quantity of about 9000—900,000 yards, which is as near as we could estimate at that time, was the amount would be required to complete the embankment.

The next day after further consideration of the second proposal, we raised that to five cents a yard which would amount to an additional compensation of \$45,000.

Neither one of these proposals, as I recall, was satisfactory to the contractor, and he made a state-

ment, if my memory serves me correctly, that they were not satisfied, because he figured the cost of excavation from that pit, which I imagine included the separation item of some manner, were  
1515 nearer 42 cents than the 29 that we were finally offering him.

It was soon after this conference that the order for changes, I believe No. 2, were prepared, and submitted, and possibly No.—I don't know whether that number is correct—it was order for changes two or three—was prepared and submitted to the contractor but was never agreed to by Mr. Wunderlich to the best of my knowledge.

Mr. Sweeney: That is all on No. 17, your Honor.

#### Cross Examination on CLAIM No. 17

By Mr. Shields:

XQ. 102. This conference on March 29, 1940, had to do with the plan of operation for the 1940 season in pit No. 2? A. Yes, sir.

XQ. 103. Some work had been done in pit 2 in 1939, had it? A. Yes, there had been some excavation.

XQ. 104. 1938, I mean. A. 1938. Thank you. Yes, there had been some excavation made in borrow pit, the lower end, the downstream end of borrow pit No. 2 to the extent of approximately 79,000 cubic yards.

XQ. 105. And it had been found that the materials in this pit or this part of the pit that had been



worked in, at least, consisted of a large part  
 1516 of cobbles suitable for the embankment as  
 cobbles? A. That is correct.

XQ. 106. At that time the contractor knew that  
 he was going to insist on cobble price, at least, for  
 doing cobble work, didn't he? A. Yes, that was  
 very evident for that particular area, because it  
 had been opened up, and he could see that that was  
 the work in the part of the pit that I previously  
 testified about a few moments ago. That portion  
 of the pit contained the largest percentage of cob-  
 bles. The offer was made to the contractor.

XQ. 107. Just this, Mr. Bahmeier: Was the con-  
 tractor ever paid for any yardage out of pit No. 2  
 as cobble on the estimates? A. No, not to the best  
 of my recollection.

XQ. 108. Paid for as earth excavation? A. Paid  
 for as earth excavation.

Redirect Examination on CLAIM No. 17

By Mr. Sweeney:

RDQ. 109. Mr. Bahmeier, do you know the per-  
 centage of cobbles taken from area borrow pit No.  
 2? Or, I should say, the percentage of material that  
 constituted cobbles from pit No. 2? A. I have.

RDQ. 110. With pit No. 2? A. Yes, I am  
 1517 familiar with that. I have examined the  
 material very carefully with respect to the  
 quantities of cobble—the quantities of cobbles—I  
 will get it after a while—quantities of cobbles that

came from borrow pit No. 2 during the 1940 season as well as the cobbles, what we term as five-inch material from the same borrow pit.

The record indicates that the average percentage of cobbles based on actual quantities is 8 per cent, was 8 per cent, is better to say it that way.

This was arrived at by taking the total quantity of rock or cobbles over five inches in size and comparing that figure with the total quantity of excavation from the pit. It was a matter of mathematical computation.

By Commissioner Evans:

RDQ. 111. What was the total quantity of excavation from the pit? A. About 800,000 cubic yards.

RDQ. 112. That was used in this average? A. Approximately 850,000 cubic yards. 846, was the exact figure, close to 850,000 cubic yards.

Mr. Sweeney: That is all of the redirect, your Honor.

1518 Recross Examination on CLAIM No. 17

By Mr. Shields:

RXQ. 113. Mr. Bahmeier, if the contractor had been required to get cobbles from the designated cobble pit instead of from a pit No. 2 designated as earth pit there would even in that case have been a large percentage of earth procured from the pit, wouldn't there? A. Yes, bound to have been, because you would have had the two gradations, plus five inch and minus five inch. Just what those

proportions would be, I can't say, because I have never seen an analysis or test of the cobble borrow material.

RXQ. 114. In other words, any cobble pit would have a various percentage of earth as well as this instance? A. I would answer it this way, Mr. Shields: If it was designated as cobble pit, probably the percentage of cobbles would be 20 per cent, maybe more, maybe 30 or 40 per cent of the total volume. A pit that only has an average of 8 per cent cannot very well be classified as a cobble pit.

And, I will offer this testimony from my own actual experience from similar material on other projects that the Bureau has constructed dams with material that ran as high as 20 per cent cobbles and was still classified and paid for at the earth borrow price. That is not excessive, at all.

RXQ. 115. In this instance, however, the government, and not the contractor, selected pit 1519 No. 2 for use? A. That is correct. It wouldn't be up to the contractor to select the borrow area. That is the government's job.

Mr. Shields: That is all.

Mr. Sweeney: That is all, your Honor, on No. 17.

Commissioner Evans: All right.

\* \* \* \* \*

1521 In other words, there will be days when, either due to weather conditions or breakdowns of equipment or short days that occur, it naturally cuts down on his production. So, in fig-

uring a profitable operation, the contractor cannot—should not be guided by his peak production, but he should be guided as to whether or not it is a profitable operation from the average production of the piece of equipment.

In this particular claim the average hourly production in excavating all types of material from borrow pit No. 1 was as follows:

The Lima dragline, which is rated as a No. 901, I believe is rated as a two and one-half cubic yard machine, but it had a three and one-half cubic yard bucket on it, actually produced 347 cubic yards per hour. That is the average production.

The Lima shovel, of two and one-half cubic yards capacity, actually produced 324 cubic yards per hour.

The Lorain shovel, the smaller shovel on the job, during the period it worked in this particular pit involved in this claim, produced 219 cubic yards per hour, which I would say would be an average production of that kind of material.

It would be a certainly profitable operation, I would think, from my experience.

I might add this comment: That this was an excellent borrow pit. Conditions were, you might say, ideal for working. Haul roads were—The elevation—Strike out that “haul roads,” please. The elevation of the larger percentage of the material coming from this pit was at last 50 feet of the crest of the dam. The contractor had a downhill haul, which is what they all



\*like to have to keep their hauling costs down. All those factors enter into the operations, of course, of the borrow pit.

Commissioner Evans: Anything else?

By Mr. Sweeney:

Q. 119. Tell his Honor, please, the period that you referred to. Was that from June 30, 1939 to October 30, 1939? A. That is correct.

Q. 120. And will you tell his Honor, please, the capacity of the Lorain shovel you referred to? A. Lorain shovel, yard and a half.

\* \* \* \* \*

1541 Mr. Sweeney: If your Honor please, Mr. Bahmeier having concluded his testimony, we are now taking up the facts regarding item No. 17 and then following on in order from there.

**Jean R. Walton**, returned to the witness stand, having been previously sworn, and testified further as follows:

#### TESTIMONY ON CLAIM No. 17

##### Direct Examination on CLAIM No. 17

Mr. Sweeney: The next item of claim, your Honor, is No. 17, a claim for material removed from the borrow pit No. 2. For the record, defendant's proofs touching this item will be divided into two parts: (1) The facts regarding the general conditions on the job; and (2) The facts regarding or

touching the equitable adjustment made by the contracting officer regarding this claim.

Your Honor will note that he made an allowance of \$44,208.85 under this item. May we at this point invite the Court's attention to the fact that this claim is covered by paragraph 52, record 77; 55, record 82; 56, record 87; 57, record 87.

By Mr. Sweeney:

Q. 992 Mr. Walton, please refer to drawing number 191-D-45 attached to Defendant's Exhibit No. F, and point out to his Honor the location of borrow pits 1 and 2 thereon that were involved in this dispute. A. I have indicated on Defendant's Exhibit F, on drawing 191-D-45, the approximate boundaries of where materials were taken out from earth borrow pit No. 2. I have indicated that with a dashed ink line and have an arrow pointing to the claim No. 17, initialled.

Q. 993. Will you note the cobble borrow pit as shown on the same drawing and mark it "Claim 17". A. I have also indicated on this same drawing by a solid ink line roughly the boundaries of the area set up in the specifications as "Cobble borrow pit area."

I have also indicated this as "Claim 17," and initialled it.

Q. 994. Now, will you also make the same notations on Defendant's Exhibit C, please? A. I have also outlined on Defendant's Exhibit C, drawing

191-D-45, revised 12-5-41, a heavy inked line around the approximate area from which excavation was made in earth borrow pit No. 2 which is involved in Claim No. 17 and initialled it.

I have an arrow pointing to this marked "Claim No. 17." I have also outlined in ink an area downstream from the dam on the left side of the river roughly outlining the area that was set up in the specifications as "Cobble borrow pit." I have an arrow going to it marked "Claim No. 17," 1543 and it is initialled.

(Papers were marked for identification Defendant's Exhibits as follows: 17-A; 17-B, consisting of four pages; 17-C; 17-D, consisting of pages 1 through 28, inclusive.)

By Mr. Sweeney:

Q. 995. We show you a document, please, marked Defendant's Exhibit 17-A, consisting of 19 pages. Tell his Honor what it reflects with respect to Claim item No. 17. Tell his Honor what it is, please.

A. Defendant's Exhibit 17-A is a 10-day earth report for construction of Vallecito Dam covering the period November 1 to November 10, 1940.

This is the last report that was made for this year and the map attached to this report shows the area from which excavation has been taken from borrow pit No. 2. No further excavation was made after this time from borrow pit No. 2.

I should like further to refer to this map that is attached, which is Page 19. It will be noted on

this map on the upper portion there is an outline of borrow pit area No. 2. The entire outline in solid dashed lines indicates the area that was explored during the fall of 1938 and the fall of 1939 and the whole earth embankment borrow pit area No. 2 was broken down into sub-areas, areas (1) to area (8) inclusive. The reason for this was that each of these areas contained material of similar characteristics and were treated as such in an 1544 earth report that was submitted to Denver.

In other words, the materials in area number (1) varied considerably from the materials in area number (4). Superimposed over these dotted lines are heavy inked lines that are colored yellow and red. The portion colored in yellow was excavation that had been made during 1940 previous to this 10-day period. The area that is colored in red indicates areas from which excavation was taken during this 10-day period. Also borrow pit area number one is shown on the map but is not involved in this claim under discussion.

It will also be noted that the earth embankment is nearing completion. The strip indicated in red on the earth embankment shows where material was placed during this 10-day period in the embankment.

By Commissioner Evans:

Q. 996. What is the significance of this 10-day period to this claim, precisely? A. It was required at this time by our headquarters, the Denver office,



that an embankment placing operations report be submitted at 10-day periods. This is the last of those submitted in 1940.

Q. 997. Is the significance of this last 10 days merely the fact that it has the final report? A.

That is right.

1545 Q. 998. The operations in this report were not confined to 10 days? A. No, sir. The only thing is that this is a progressive report, that is the area outlined on the report is progressive and this does show the entire excavation made during the entire year.

Q. 999. Very well. A. It will also be noted on this map that there are indicated by dotted lines two areas in the downstream end of borrow pit No. 2 from which excavation was made in 1938 and 1939. That is indicated by a notation.

Also is shown the location of the screening plant.

Mr. Sweeney: The document is offered, if your Honor please, to illustrate the testimony to be given by the witness.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-A, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1000. We show you, please, a document marked Defendant's Exhibit 17-B, consisting of four pages. Tell his Honor what it is. A. Exhibit 17-B encompasses four reports made, by me to the

resident engineer, daily reports. These reports are signed by me. They are dated 7-9-40; 6-25-1546 40; 5-14-40; and 4-25-40. Each of these has a reference in it which is indicated by a red mark that refers to this particular operation.

Mr. Sweeney: The document is offered, if your Honor please, to illustrate the testimony to be given by the witness.

Mr. Shields: This document which is offered is headed "Inspectors' daily report," and it appears that the reports attached are widely separated daily reports. Will all the reports on this subject be made available?

The Witness: They will not, because they are too bulky. These are some to illustrate particular points that are brought out. If you prefer that we wouldn't put these in and I will just refer to them in my testimony, we will do that.

Mr. Shields: I object to these as self-serving documents put in by the witness and they are not complete.

Mr. Sweeney: These are obviously, as they show on their faces, daily reports, admissible as stated by the Court, I believe, in the Rosser case in 46 Court of Claims, citing the McCoy case.

By Commissioner Evans:

Q. 1001. Are these the only four pertinent to this claim? A. Yes. They substantiate statements I will make in testifying.

Q. 1002. May plaintiff have an opportunity, if he wants, to check, to examine the others and  
1547 • see? A. There are some of the other reports that we propose to use as exhibits that pertain to some of the other claims.

Mr. Sweeney: May I suggest, it is my understanding, if your Honor please, that these records are down in Bayfield, Colorado, 450 miles from here through the snowdrifts.

Commissioner Evans: That is up to the contractor.

Will the government permit the plaintiff to examine them if he wants to?

Mr. Sweeney: I say yes for the United States, if your Honor please.

Mr. Shields: And I make the further objection that the witness says that these are merely to supplement what he could testify. It looks like he could testify to the facts.

Commissioner Evans: I think that goes without saying.

• The exhibit is received for the purpose for which it was offered.

(The document referred to, marked defendant's Exhibit 17-B, consisting of four pages, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1003. We next show you a document marked defendant's Exhibit 17-C. Tell his Honor what it is.

A. Defendant's Exhibit 17-C is a drawing prepared in the project office at the close of the job 1548 showing the various portions of both borrow pit No. 1 and borrow pit No. 2 from which excavation was made in 1938, 1939 and 1940.

This has a legend on it which explains from which different area excavation was made in the different years and indicates the areas involved in this claim. This drawing is similar but to a larger scale and it is more complete than the one which is attached to this last earth report.

Mr. Sweeney: The document, if your Honor please, is offered to illustrate the testimony to be given by the witness.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-C, is filed in connection with this case.)

(Short recess.)

By Mr. Sweeney:

Q. 1004. We show you a document marked Defendant's Exhibit 17-D, Page 1. Tell his Honor, please, what it is. A. This photograph was taken on November 20, 1939 and shows excavation being made by both the Lima dragline and Lima shovel in the downstream end of earth borrow pit No. 2.

This is in what was later designated as area No. 1.



This is in the portion of the pit which the government concedes the cobble content was heavier than the average of the earth embankment borrow pit and offered to set this up as a cobble borrow pit area.

By the Commissioner:

Q: 1005. Will you indicate where, at the time this picture was taken, what element or strata was being excavated? Where did the dragline dip in? A. Right here at the bottom.

Q: 1006. This bucket from the dragline as shown in the photograph drops down to the bottom and picks a load up from the bottom and not from the side? A. That is correct. No, sir. He starts the cut at the bottom of where the bucket drops to and cuts all the way up the slope coming up. The dragline is setting at a higher elevation excavating below its track, while the shovel is sitting in the bottom of the pit excavating above the tracks.

Mr. Sweeney: The document is offered as Defendant's Exhibit 17-D, Page 1, to illustrate the testimony to be given by the witness.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 1, is filed in connection with this case.)

By Mr. Sweeney:

1550 Q: 1007. We show you a document marked Defendant's Exhibit 17-D, Page 2. Tell his

Honor what it is. A. This photograph was taken on November 22, 1939, and it is a closeup view of the shovel excavating in area No. 1 of borrow pit No. 2. The material from this excavation was placed on the embankment in lifts that would compact to six inches and the plus-five-inch rock removed by means of a rakedozer supplemented my hand picking. This is also the area that was proposed to be set up as a cobble borrow pit area.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 2 for the same purpose.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 2, is filed in connection with this case.)

Mr. Sweeney: And that will apply to all other exhibits.

By Mr. Sweeney:

Q. 1008. We show you a document marked Defendant's Exhibit 17-D, Page 3. Tell his Honor what it is. A. This is a photograph dated May 9, 1940, showing the Lima dragline excavating, also in area No. 1 of earth embankment borrow pit No.

2. The material was also placed in the embankment and the rocks removed by the rakedozer method.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 3.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 3, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1009. We show you a document marked Defendant's Exhibit 17-D, Page 4. Tell his Honor what it is. A. Photograph dated May 9, 1940 and is taken showing the Lima shovel excavating earth materials from area No. 1, borrow pit No. 2.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 4.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-C, Page 4, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1010. We show you a document marked Defendant's Exhibit 17-D, Page 5. Tell his Honor what it is. A. This is a photograph dated May 13, 1940, showing the Lima shovel excavating material from borrow pit No. 2. This excavation is also in what is later designated as area No. 1.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 5.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 5, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1011. We show you a document marked Defendant's Exhibit 17-D, Page 6. Tell his Honor what it is. A. This is a photograph taken on May 15, 1940, which shows the Lima shovel excavating materials from earth embankment borrow pit No. 2 also in what was later designated as area No. 1.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, page 6.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 6, is filed in connection with this case.)

By Mr. Sweeney:

1553 Q. 1012. We show you a document marked Defendant's Exhibit 17-D, Page 7. Tell his Honor what it is. A. This is a photograph showing a closeup view of some of the excavation that had been made in borrow pit No. 2.

It will be noted that there is no excessive amount of plus-five-inch stones.



Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 7.

Mr. Shields: I move to strike that last part of the answer.

Commissioner Evans: It is allowed.

Mr. Shields: Otherwise, no objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 7, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1013. We show you a document marked Defendant's Exhibit 17-D, Page 8. Tell his Honor what it is. A. This is a photograph of the Lima shovel excavating in area No. 2 borrow pit No. 2 on May 24, 1940.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, page 8.

Mr. Shields: No objection.

Commissioner Evans: So received.

1554 (The document referred to, marked Defendant's Exhibit 17-D, Page 8, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1014. We show you a document marked Defendant's Exhibit 17-D, Page 9. Tell his Honor what it is. A. This is a photograph, May 4, 1940, showing a Euclid truck load of material being dumped on the embankment.

The oversized stones were removed from this material by means of the rakedozer method.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 9.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 9, is filed in connection with this case.)

By Mr. Sweeney:

Q: 1015. We show you a document marked Defendant's Exhibit 17-D, Page 10. Tell his Honor what it is. A. This is a photograph of excavation being made in borrow pit area No. 2 in the portion of the pit that was later designated as area No. 1, dated May 24, 1940.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 10.

Mr. Shields: No objection.

Commissioner Evans: So received.

1555 (The document referred to, marked Defendant's Exhibit 17-D, Page 10, is filed in connection with this case.)

By Mr. Sweeney:

Q: 1016. We show you a document marked Defendant's Exhibit 17-D, Page 11. Tell his Honor what it is. A. This is a photograph taken on May 24, 1940 which shows the dozer with rake attach-

ment spreading material and a Euclid dump truck dumping material that has come from borrow pit No. 2. This is on the wing.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 11.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 11, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1017. We show you a document marked Defendant's Exhibit 17-D, Page 12. Tell his Honor what it is. A. This is a photograph showing the rakedozer spreading material coming from borrow pit No. 2 on May 30, 1940. The rock in the background of this picture is in the cobble fill portion of the embankment and is rock that has been removed from the earth materials. Part of this has come from the screening plant during the previous season.

Mr. Sweeney: This document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 12.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 12, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1018. We show you a document marked Defendant's Exhibit 17-D, Page 13. Tell his Honor what it is. A. This is a picture of the Lima shovel excavating material from borrow pit No. 2 area No. 6. It was taken on May 30, 1940.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 13.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 13, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1019. We show you a document marked Defendant's Exhibit 17-D, Page 14. Tell his Honor what it is. A. This is a photograph taken on May 30, 1940 on the embankment looking toward the right abutment and shows the material that is being placed in the upstream part of the No. 2 section, the material having been excavated from borrow pit No. 2. It will be noted that a windrow of stones is laying in the central portion of the picture. These have been removed from materials by raking with the dozer and will be placed in the cobble section of the embankment.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 14.



Mr. Shields: No objection,  
 Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 14, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1020. We show you a document marked Defendant's Exhibit 17-D, Page 15. Tell his Honor what it is. A. This is a photograph taken on May 31, 1940, showing the Lima dragline excavating materials from area No. 2, earth embankment borrow pit No. 2.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 15.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 15, is filed in connection with this case.)

1558 By Mr. Sweeney:

Q. 1021. We show you a document marked Defendant's Exhibit 17-D, Page 16. Tell his Honor what it is. A. This is a photograph taken on June 20, 1940. It shows a haul road going into borrow pit No. 2. This is looking upstream. The truck approaching is coming towards the dam.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 16.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 16, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1022. We show you a document marked Defendant's Exhibit 17-D, Page 17. Tell his Honor what it is. A. This is a photograph taken on June 20, 1940, which shows the face of the cut in borrow pit No. 2.

Stadia rod shows about the bottom of the depth of glacial till and the material below the bottom of the stadia rod in the central portion of the picture consists mostly of gravel and sand.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 17.

Mr. Shields: No objection.

1559 Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 17, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1023. We show you a document marked Defendant's Exhibit 17-D, Page 18. Tell his Honor

what it is. A. This is a photograph taken on June 22, 1940, which shows the face of a cut in borrow pit No. 2. The upper half of the cut is in glacial till but the lower half is mostly sand and gravel. This excavation in this area was made in two cuts.

By The Commissioner:

Q. 1024. What is the pole in the middle? A. That is a stadia survey rod.

Q. 1025. Does the horizontal line close to the top of that indicate the first half of the excavation?  
A. No, sir.

Q. 1026. What is the line that shows near the top of that pole? A. That is just a strata of the material, probably sandy lands that run through there.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 18.

Mr. Shields: No objection.

Commissioner Evans: So received.

1560 (The document referred to, marked Defendant's Exhibit 17-D, Page 18, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1027. We show you a document marked Defendant's Exhibit 17-D, Page 19. Tell his Honor what it is. A. This is a photograph taken on July 6, 1940, which shows the shovel and the dragline making a simultaneous excavation in borrow pit No. 2, area No. 2. The shovel is excavating the cut above

the roadway that the trucks are running on while the dragline is excavating below this roadway.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 19.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 19, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1028. We show you a document marked Defendant's Exhibit 17-D, Page 20. Tell his Honor what it is. A. This is a photograph taken on July 9, 1940, showing the picture of a 18-yard Euclid bottom dump truck which had just recently been received on the job, hauling material from borrow pit No. 2. This is on the embankment.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, 1561 Page 20.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 20, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1029. We show you a document marked Defendant's Exhibit 17-D, Page 21. Tell his Honor



what it is. A. This is a photograph taken July 15, 1940, which shows the face of a cut from which the shovel is excavating in borrow pit No. 2, area No. 2.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 21.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 21, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1030. We show you a document marked Defendant's Exhibit 17-D, Page 22. Tell his Honor what it is. A. This is a photograph taken on July 30, 1940, which shows the Lima dragline excavating in borrow pit No. 2, area No. 7. The average depth of the cut is about 17 feet.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, 1562 Page 22.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 22, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1031. We show you a document marked Defendant's Exhibit 17-D, Page 23. Tell his Honor what it is. A. It is a photograph of the Lima shovel excavating in borrow pit No. 2, area No. 6. The average depth of the cut is 33 feet. This cut consists mostly of gravelly material but there is a lens of about six feet that is glacial till.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 23.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 23, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1032. We show you a document marked Defendant's Exhibit 17-D, Page 24. Tell his Honor what it is. A. This is a photograph taken August 7, 1940. This shows the Lima dragline excavating material for the embankment from area No. 8 of borrow pit No. 2. The cut is about 18 feet in depth, the upper 10 feet of which is glacial till and 1563 the lower eight feet is gravel and sand.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 24.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 24, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1033. We show you a document marked Defendant's Exhibit 17-D, Page 25. Tell his Honor what it is. A. It is a photograph dated September 13, 1940, which shows the dragline making excavation in earth borrow pit No. 2, area No. 1. This area No. 1 is the portion of borrow pit No. 2 that was at one time proposed to be set up as a cobble borrow pit.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 25.

Mr. Shields: No objections.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 25, is filed in connection with this case.)

1564

By Mr. Sweeney:

Q. 1034. We show you a document marked Defendant's Exhibit 17-D, Page 26. Tell his Honor what it is. A. It is a photograph taken on October 28, 1940, showing the dragline taking the second cut through borrow pit No. 2.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 26.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 26, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1035. We show you a document marked Defendant's Exhibit 17-D, Page 27. Tell his Honor what it is. A. This is a photograph taken on October 31, 1940, showing the Lima shovel taking the second cut in borrow pit No. 2 at stage 65 plus 50 over 16 plus 50. The average depth of the cut is about 12 feet.

Mr. Sweeney: The document is offered, if your Honor please, as Defendant's Exhibit 17-D, Page 27.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document referred to, marked Defendant's Exhibit 17-D, Page 27 is filed in connection with this case.)

1365 By Mr. Sweeney:

Q. 1036. We show you a document marked Defendant's Exhibit 17-D, Page 28. Tell his Honor what it is. A. This photograph was taken on July 15, 1941.



It shows the Lorain shovel making excavation in what was later designated as borrow pit No. 3. This is in the area that is shown on specification drawing as "Cobble borrow pit area." This excavation wasn't involved in the claim.

Mr. Sweeney: Defendant's Exhibit 17-D, Page 28 is now offered to illustrate the testimony to be given by the witness.

Mr. Shields: The last is objected to as irrelevant, "not being involved in any present claim."

Commissioner Evans: Why is it offered?

The Witness: It is offered for purposes of comparison.

(Conference off the record.)

Commissioner Evans: Objection overruled and the document is received as offered.

(The document referred to, marked Defendant's Exhibit 17-D, Page 28, is filed in connection with this case.)

Mr. Shields: Plaintiff hasn't objected to these pictures. They are correct and show what they show, but they are selected pictures and plaintiff wants access to the complete files showing photographs not represented by these pictures but shown by other pictures taken in the regular course.

1566 They selected certain pictures showing the least possible amount of trouble. They haven't selected the representative pictures at all.

Mr. Sweeney: May the record show that the plaintiff has also selected certain pictures.

Mr. Shields: We got them from you. We did not take them.

Commissioner Evans: The witness desires to make a statement. I will hear him.

The Witness: I would like to say in this connection that the contractor was given a full opportunity to come up and examine our photograph file covering every picture that was made on the project and select what pictures he desired from these, which we ordered for him from Denver, which have been used in this suit to bring out the points that they desired to bring out in the various claims.

Commissioner Evans: To whom was that offer made?

The Witness: Mr. Ted Wunderlich came up and went through the entire album and selected what pictures he desired.

Commissioner Evans: Do you make your statement in the form of an objection, Mr. Shields?

Mr. Shields: Well, I don't desire to make an objection. I desire the record to show that plaintiff believes these are not representative pictures.

Commissioner Evans: No ruling is necessary.

Mr. Shields: No.

Commissioner Evans: Very well.

(Conference off the record.)

Commissioner Evans: We will take an adjournment until 9:30 o'clock, Monday-morning.

(Thereupon, at 4 o'clock p.m., November 16, 1946, an adjournment was taken in these proceedings until 9:30 o'clock p.m., November 18, 1946.)

1568 (The parties met, pursuant to recess, at 9:30 o'clock a.m., on the 18th day of November, 1946, in the Court Room of the United States Court of Appeals, Post Office Building, Denver, Colorado, Appearances were as previously noted.

Mr. Harold E. Hastings, a certified shorthand reporter, was duly sworn by the Commissioner.)

And thereupon, the following proceedings were had:

By Mr. Sweeney:

Q. 1037. Mr. Walton, I show you a document marked 17-E. Tell us what that is? A. Defendant's Exhibit 17-E is a memorandum report to the Construction Engineer on the operation—copy of a memorandum report to the Construction Engineer on the operation of the earth embankment, barrow pit number two at Vallecito, represented by me, dated December 20, 1940.

Q. 1038. Would you just describe in some detail what it is and in what way it relates to this item? A. This report was prepared to be transmitted by the Construction Engineer to the Contracting Officer in order to give the Contracting Officer the facts

relative to barrow pit number two and some cost data that we had kept on the job in order for the Contracting Officer to arrive at an equitable adjustment and compensation under Change Order Number Three.

Q. 1039. Has this been taken from official files?

A. From the project files.

Mr. Sweeney: It is now offered to illustrate the testimony to be given by the witness.

1569 The Witness: I would also like to state in that connection that it will be noted that in that report there are a few photographs missing. The most of these have already been put in evidence in Defendant's Exhibit 17-D, and those that are not in evidence are in the photograph album which, I believe is in the court room, which the Defendant's attorney can examine if he so desires at this time. The reason that that is not in there is that we did not have enough of these copies in the project files.

Mr. Shields: These represent the condition of the project on or about December 20, 1940?

The Witness: That is correct. The four that are contained in this report were gathered during the operation. It was a matter of controversy and we have been unable to reach an agreement with the contractor and he had been given a Form B-3, Order for Change Number Three which directed him to proceed with the work and submit his statement of additional cost after the work was com-



pleted. This data was gathered and kept by Bureau of Reclamation engineers.

Mr. Shields: What would you say as to the source of the data from which this was collated? Would you enumerate something which you did resort to?

The Witness: Well, most of it was gathered by inspectors working under my direction during the progress of the work. Some of it I gathered myself.

Mr. Shields: Were these reports, made by 1570 the inspectors, received and incorporated in the data which you used; as coming from them?

The Witness: Some of it is in the project files at Vallecito Dam; some of the information I gathered myself and kept in notes and then incorporated into reports.

Mr. Shields: Are the notes and inspector's reports, from which you collected this data, available for inspection?

The Witness: They are, I think, in the Vallecito Dam files; they are not here. They were in the Vallecito Dam files last, when I prepared this; I presume they still are.

Mr. Shields: I have no objection to the exhibit as such. We do object to this witness testifying on hearsay or any hearsay information incorporated in the document and moves that all such be disregarded.

Commissioner Evans: How do you think it can be determined?

Mr. Shields: That, I presume, will be developed as we go along; I don't know now.

Commissioner Evans: It will be received.

(The document above referred to, marked Defendant's Exhibit 17-E, is filed in connection with this case.)

The Witness: That report contains an index and then the narrative portion of the report including photographs consists of pages 1 to 72 inclusive and an attached drawing number 131.

By Mr. Sweeney:

Q. 1040. I show you a document marked 17-F, pages 1 to 7 inclusive. Tell his Honor what that is.

A. Exhibit 17-F-1 is a letter from the Construction Engineer to the Chief Engineer 1571 that was written by me and all the data attached thereto was prepared by me. This letter merely supplements that report and makes some changes in the total cost figures as shown in the report by reason of the project having received some rental rates from the Contracting Officer that were to be used that were slightly at variance with the ones that had been used in the report. In other words, the figures shown in this letter are the final figures as to costs. That supplements the figures shown in the previous exhibit.

Mr. Sweeney: It is now offered.

Mr. Shields: It is objected to because it was not brought to the attention of the Contracting Officer.

Mr. Sweeney: May the Court please, that is one of the reports or communications from the Defendant's engineers on the job.

Mr. Shields: It was not brought to the attention of the Contracting Officer.

Mr. Sweeney: To help understand the evidence; it is a part of the transaction and relates to the transaction. It is explanatory of the fact itself and an essential part of it. Without the whole transaction it can not be fully understood. I submit, if your Honor please, that was written at the time of the transaction and it is essential to explain it.

Commissioner Evans: The objection is overruled. You may proceed.

1572

By Mr. Sweeney:

Q. 1041. I show you a document marked Defendant's Exhibit 17-G. Will you tell His Honor what that is? A. Defendant's Exhibit 17-G is a tabulation of areas in barrow pit number two from which it was proposed to get the material needed from this barrow pit during 1940, showing the percentage of cobble contained in each one of these areas as reflected by the data from logs of test pits. This was prepared prior to the time any excavation in 1940 was accomplished. The map attached thereto is dated January 22, 1940.

That tabulated data gives, under where it says "Cobble Percentages" under "A", is the percent of cobbles in the excavation that is in solid volume.

Under "B" it gives the percent of cobbles taken

on the basis of embankment yardage. In other words, this includes void space that is in cobble fill which, of course, makes the cobble amount higher.

This shows the three inch to five inch rock and the plus-five inch rock in a percentage basis.

The column headed "A" and headed "Plus-five Inch" is the column that shows the percentage compared with the total solid excavation. This is explained in an explanatory statement at the bottom of that.

The map attached thereto has areas 1 through 8, barrow pit number two, outlined by heavy lines and it also indicates a proposed branch operation of the barrow pit to secure the material that was needed to complete the embankment and also

1573 to complete the cobble section of the embankment. This was merely done for formulating a plan of operation previous to the commencement of the placing operation for the 1940 season.

Also indicated on this map is a green dashed line which shows the indeterminate line or approximate location. The indeterminate line, as shown on the specification drawing 181-D-45, earth embankment, barrow pit area on the left side of the river.

Q. 1042. Tell us, please, did you prepare the tabulated data? A. I prepared the tabulated data but the penciled figures that are on here are not mine; these were put on, I think Mr. Bahmeier put those in in the Denver office when we were up there in conference.



Mr. Sweeney: No reference will be made to the penciled notes. Your Honor. It is now offered.

Mr. Shields: Was this data obtained from test pits?

The Witness: That data that is on there is from these test pits which were excavated which I will explain shortly. The entire quantity of the material coming from test pits was screened by government forces over three-inch screens and over a five-inch screen and this is a summation of the data of a test pit in each of these respective areas.

Mr. Shields: The excavation in 1940 was actually carried on in the neighborhoods in areas indicated by this drawing and by this tabulation?

1574 The Witness: By referring to Defendant's Exhibit 17-C, you can see what portion of each of these areas that excavation was actually taken from.

Mr. Shields: I object to data based on test pit examination or information obtained as stated; it was not made available.

Mr. Sweeney: It is to illustrate testimony which will be given by the witness.

Commissioner Evans: The objection is overruled.

Mr. Shields: Exception.

Commissioner Evans: It is so received.

(The document above referred to, marked Defendant's Exhibit 17-G, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1043. I hand you a document marked Defendant's Exhibit 17-H, pages 1 to 4 inclusive. Tell us what it is. A. That is a letter from Martin Wunderlich Company to the Construction Engineer, dated December 23, 1939; a letter from the Construction Engineer to the Martin Wunderlich Company, dated December 15, 1939; a letter to Martin Wunderlich Company from the Construction Engineer dated June 29, 1938; and a telegram to the Martin Wunderlich Company, signed "Burns", dated December 21, 1939.)

Q. 1044. Will you explain to His Honor what was the purpose of the offer? A. These letters are introduced to illustrate the difficulty that the Construction Engineer was having in getting the contractor to designate a superintendent with full authority to act for him.

Commissioner Evans: Do they pertain to Claim 17?

The Witness: Yes, sir.

Mr. Shields: I object on the ground that they are already in evidence.

Mr. Sweeney: I checked carefully last night and they are not in evidence.

Commissioner Evans: So received.

(The document above referred to, marked Defendant's Exhibit 17-H, pages one to four inclusive, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1045: I show you a document which has been marked Defendant's Exhibit 17-I, pages one to two inclusive. Tell His Honor what it is? A. This exhibit is a letter from the Chief Engineer, Mr. Harper, to the Martin Wunderlich Company. It is dated August 29, 1940, which encloses a photograph or draft of the form that is used on a Form "B" order which I think was requested by Mr. Wunderlich.

Mr. Sweeney: It is now offered.

Mr. Shields: No objection.

Commissioner Evans: It will be received.

(The document above referred to, marked Defendant's Exhibit 17-I, two pages, is filed in connection with this case.)

1576 Mr. Sweeney: We next offer a certified copy of a letter dated September 9, 1940, from the Commissioner to the Secretary of the Interior and the Secretary's approval thereof is noted on the order. This is approval for proposed order for change number three. It is now offered.

Commissioner Evans: Is there any objection?

Mr. Shields: No objection.

Commissioner Evans: It will be received.

The document above referred to, marked Defendant's Exhibit No. 17-J, three pages, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1046. I show you a document marked Defendant's Exhibit No. 17-K. Tell His Honor what that is. A. This is a copy of a letter from the project files to the Martin Wunderlich Company dated October 7, 1940, from the Construction Engineer. It transmits a copy of Order for Change Number Three.

Mr. Sweeney: It is now offered.

Mr. Shields: No objection.

Commissioner Evans: It will be received.

(The document above referred to, marked Defendant's Exhibit No. 17-K is filed in connection with this case.)

By Mr. Sweeney:

Q. 1047. I show you a document which has been marked Defendant's Exhibit No. 17-L. Tell His Honor what that is. A. This is a letter from the Construction Engineer to the Chief Engineer, dated October 17, 1940; which states that the local office of the Martin Wunderlich Company advises that they have been informed about the Jefferson City office that the order—

Q. 1048. Never mind reading it—A. Has it been received?

Mr. Sweeney: It is offered, Your Honor.

Mr. Shields: It is objected to as irrelevant and of no value in this case and, in any event, it is inter-departmental.

Commissioner Evans: May I look at it?



Mr. Sweeney: It is offered, Your Honor, to show that the Construction Engineer is advising the Chief Engineer in Denver that the Martin Wunderlich Company has acknowledged receipt of the order as stated therein. It was written at the time, if Your Honor please, which relates to this transaction.

Mr. Shields: Acknowledgment was given and that letter was not necessary to establish the fact.

Commissioner Evans: Is the letter of acknowledgment in the record?

Mr. Shields: Yes, sir.

Mr. Sweeney: I can't say that it isn't; I haven't any record of it; it may be. There are some documents that I just can't keep.

Commissioner Evans: I will overrule the objection; it appears to be harmless. It is received.

(The document above referred to, marked Defendant's Exhibit No. 17-L, is filed in connection with this case.)

1578 Q. 1049. By Mr. Sweeney: I show you a document which has been marked Defendant's Exhibit No. 17-M, pages one to seven; please tell His Honor what it is. A. That is a letter dated April 30, 1941, from the Construction Engineer to the Chief Engineer. This letter deals with the Contractor's detailed Submission of Claim and discusses it fully—discusses the hours of labor and the hours of operation of equipment and are in substantial agreement with the records that have been kept.

by the government. It is a letter consisting of three pages and there are four pages of tabulated data attached thereto that were prepared by me.

Mr. Sweeney: It is now offered.

Mr. Shields: It is interdepartmental, self-serving and was not brought to the attention of the Plaintiff. It is objected to for that reason.

Commissioner Evans: The objection is sustained.

Mr. Sweeney: May we please point out, if Your Honor please, this is a communication from the Construction Engineer to the Chief Engineer in Denver explaining the facts regarding the claims presented by the Plaintiff.

Mr. Shields: Give us a copy of it and it will be all right.

Mr. Sweeney: It relates to the transaction and is explanatory as part of the information that the Chief Engineer had to have before he could make any determination and we submit, if your Honor

please, very respectfully, under the rules 1579 stated in the McCoy case 193 U. S. 593, and

Rosser, Case 46, Court of Claims, 192, 196 that this is one of the communications from a subordinate officer to a superior officer on the basis of which the superior officer is enabled to make his determination, required under the contract, without which he couldn't do it.

Commissioner Evans: The record contains your statement and the document will be up with the record. See R1580.

By Mr. Sweeney:

Q. 1050. We show you document marked Defendant's Exhibit 17-N, one page. Tell His Honor what that is? A. This is a letter dated April 4, 1940, from the Construction Engineer to the Martin Wunderlich Company, taken from the Denver files, I guess. This letter—

Commissioner Evans: It pertains to this claim?

The Witness: Yes, sir.

Commissioner Evans: Any objection?

Mr. Shields: No objection.

Mr. Sweeney: It is now offered.

Commissioner Evans: It will be received.

(The document above referred to, marked Defendant's Exhibit No. 17-N, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1051. I show you a document marked Defendant's Exhibit No. 17-O. Tell his Honor what it is, please. A: That is a telegram from the Chief Engineer to the—

Commissioner Evans: What is the Exhibit number?

The Witness: 17-O. A. (Continuing) to the Construction Engineer, Vallecito Dam.

Q. 1052. What does it relate to? A. It relates to the location of barrow pits for the 1940 operation; dated April 15, 1940.

Mr. Sweeney: It is now offered, Your Honor.

Mr. Shields: It is objected to as being interdepartmental and was not brought to the attention of the Contractor.

Mr. Sweeney: Off the record a moment, if your Honor please.

Commissioner Evans: Off the record.

(Whereupon, there was unrecorded discussion.)

Commissioner Evans: On the record.

Let the record show that the objection is overruled and the document is received, and at the same time the ruling pertaining to Defendant's Exhibit 17-M is reversed; the objection is overruled and the document is admitted.

Does the Plaintiff wish to enter an exception?

Mr. Shields: We note an exception.

(The document above referred to, marked Defendant's Exhibit No. 17-O, is filed in connection with this case.)

(The document above referred to, marked Defendant's Exhibit No. 17-M, is filed in connection with this case.)

By Mr. Sweeney:

Q: 1053. I show you a document which has been marked Defendant's Exhibit 17-P, 1 to 13 inclusive. Will you please tell His Honor what it is? A: This exhibit is a copy of a letter from the Construction Engineer to the Chief Engineer, dated April 27, 1940, transmitting copies of two letters—one dated April 24, 1940, and one



April 27, 1940—that were sent to the Martin Wunderlich Company by the Construction Engineer.

Attached to the letter of April 27, 1940, is a record of the logs of all the test pits excavated in the earth embankment or borrow pit number two along with map number 60 which outlines the area that it was proposed to take the various types of material from during 1940. Indicated on here are the zones of embankments for which the material in each of the areas are suitable and a note that states that the boundaries indicated are approximately correct only.

Mr. Sweeney: It is now offered.

Mr. Shields: We make the same objections as advanced on the others which Your Honor just overruled.

Commissioner Evans: Objection overruled; the documents are admitted.

(The document above referred to, marked Defendant's Exhibit No. 17-P, three pages, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1054. I show you a document marked Defendant's Exhibit No. 17-Q, pages one to seven. What is it, please? A. This is a letter from the Construction Engineer to the Martin Wunderlich Company which transmitted Order for Change Number Two; also attached to this is a letter from the Chief Engineer to the Construction Engineer which contains copies for Order for

Change Number Two and directing him as to the transmittal of these.

Q. 1055. Are these necessary to illustrate the testimony which you are to give? A. I don't think that Order for Change Number Two is in evidence.

Q. 1056. Tell us. A. That's right, it is necessary.

Mr. Sweeney: It is offered in evidence.

Mr. Shields: No objection other than that the Plaintiff never accepted Change Order Number Two.

Commissioner Evans: It is accepted in evidence.

(The document above referred to, marked Defendant's Exhibit No. 17-Q, seven pages, is filed in connection with this case.)

By Mr. Sweeney:

Q. 1056. Tell His Honor what are the facts regarding this item with respect to the conditions on the job.

Commissioner Evans: The items being Claim Number 17.

Q. 1057. Claim 17 wherein the Plaintiff is asking for \$181,000.00—

✓ Commissioner Evans: I am familiar with it.

A. The claim number 17 involves excavation from earth borrow pit number two on the left side of the Pine River, upstream from Vallecito 1583 Dam.

The specifications include drawing number 191-D-45, on which are shown two earth barrow pits or proposed areas from which mate-

rial would be secured for the construction of the dam; also shown down stream from the dam, on the left hand side of the river, is indicated an area from which it is proposed to secure cobbles to make up any deficiency that is lacking from other excavations.

Mr. Shields: I object to that last. It doesn't say that on the drawing; it is the witness' own interpretation and I move it be stricken.

Commissioner Evans: The motion is allowed.

Mr. Sweeney: Let me talk off the record, if Your Honor please.

(Whereupon, there was unrecorded discussion.)

The Witness: The contract set up in schedule item 14 was the excavation from earth barrow pits under schedule item number 16, the excavation for cobble barrow pit.

Commissioner Evans: May I interrupt a moment, I have a question for Mr. Sweeney. There is a difference in phraseology between item and claim. We understand of course what the claims are. What are contract items?

Mr. Sweeney: Well, I would say schedule items that are in the specifications.

Commissioner Evans: Very well.

Mr. Sweeney: Page 45, Judge.

The Witness: That refers to the schedule items in the specifications.

1584 Commissioner Evans: Contract item 14 is the one that carries into that claim 17, is that right?

The Witness: Item 14, that is correct, sir.

Commissioner Evans: All right, and item 16 is a point of controversy. Go ahead.

A. I might say here that the contract bid price under schedule item 14 was 23c per cubic yard; under schedule item 16 it was 35c per cubic yard.

Late in the fall of 1939, as has previously been explained in claim item number one, the materials suitable for number one and three zones of embankment was practically exhausted in borrow pit number one.

Previous to this time material for all three zones of the embankment had been secured from barrow area number one.

As I explained in that claim, item number one, the contractor was taking all the material available for these number one and number three zones from the barrow area number one and for a while it looked as though the work for that year would be completed without making excavations from barrow area number two. Late in November, however, to secure materials to complete the number one and three zones of the embankment up to the elevation at which the number two zone was then completed it became necessary for the contractor to excavate some material from barrow area number two. This was done during the month of 1585 November.

During the 1938 construction season, a small area on the right side of barrow area number two had been used to secure impervious material consisting of silt and clay for the construc-



tion of a portion of the coffer dam and for filling the cut-off trench across the river channel. This involved the excavation of approximately 94,000 to 95,000 cubic yards. The excavation was made with Laterno Carry-all Scrapers and made in that location at the contractor's request—in this area, and for the convenience of himself because of the ease of operation and short haul involved. All of the impervious material consisted of silt and clay and was removed in this operation and coarse-graded, gravelly material was encountered.

This excavation that was made in 1938, of course, being made with scrapers, was taken off in six inch to eight or ten inch lifts, the operating characteristics of a scraper being entirely different from a shovel or drag line.

When the contractor decided during the month of November, 1939, that it was going to be necessary to go to this pit to secure a small quantity of material to finish up the embankment before we were shut down, due to freezing weather conditions, as I remember it, the first of November, the Lima shovel was moved into this pit and when the freezing weather conditions became such that impervious material could no longer be placed—the drag line was also moved over to this pit until such time that a total of approximately 79,000 yards was excavated during 1939 from barrow pit number two.

I might explain here that one reason that two machines were moved over to this pit was

that we had allowed the contractor to proceed as far as we could with the construction of the impervious zone because we were getting freezing weather practically every night and we knew that it was only a short while until the construction of the number two zone would need to be suspended because of the frost in the ground and the requirements of the specifications that no material could be placed when the embankment was frozen.

It was possible to continue placing material in the number one and number three zones for a considerably later period than it was in the number two zone because that could be thawed out each morning if the frost had not penetrated too deep, by sprinkling the fill. In other words the water would thaw out the fill and we could go ahead placing the material until late in the evening and therefore it was possible to continue a little later after operations had been suspended in the impervious zone.

This completed all operations that were done in barrow pit number two during 1939. When the payment voucher was submitted to the contractor for signing, covering the monthly estimate for November and the first few days in December, it was the final voucher for the season's operation, the chief clerk for the contractor objected, or I might say, to the payment because he stated that they had made a considerable quantity of cobble barrow excavation and had not been paid for any cobble barrow pit excavation; the payment had been paid un-

der schedule item 14, from earth embank-  
1587 ment barrow pits.

It was apparent during the later part of the 1939 construction season that practically all of the remaining coarse graded materials for the number one and number three zones of the embankment and possibly a small quantity for the number two zone of the embankment would have to, of necessity, come from barrow area number two. In order to properly zone the barrow pit for distribution of the materials from barrow pit to the embankment, the government forces carried on extensive exploration activities during the fall of 1939 and this extended on into the winter and the early part of the winter of 1940.

Test pits were excavated on approximately 200-foot centers over the entire area that is outlined by the dashed lines on Defendant's Exhibit 17-C in earth embankment barrow pit number two. Samples were taken from each of these test pits and complete analysis run in our field laboratory for gradation, percolation and compaction.

In excavating these test pits with government forces, we screened all of the material that was taken from each test pit over a screen having three-inch square openings and over another screen having five-inch openings, thus to determine the percentage by volume of rock from three to five inches in size and over five inches in size contained in the volume of each of these test pits. This data was used in formulating a plan of operation for 1940.

such that the embankment could be completed and also to see if the embankment could be completed or, that is, the cobble portion of the embankment could be completed with the cobbles secured from the required structure excavation and the 1588 barrow pits without making excavations from the cobble barrow area.

The data that has been tabulated on Defendant's Exhibit 17-G shows this information. Now it will be noted on this exhibit that in one column is shown plus-five inch rock which is in solid volume and is the percentage of solid volume that was excavated from each test pit. In another column is shown the percentage on the basis of the cobble recovery in embankment measured—I would like to explain here the cobbles as they are placed in the fill leave a large amount of air void space because they are large size pieces and do not fit closely together while in the barrow pit all the excavation all the void space is filled with fine graded material and it is compacted solidly in there such that, we'll say, the material contains ten percent of cobbles in embankment measure would produce more than ten percent of cobbles or, I mean, in barrow pit measure, would produce more than ten percent of cobbles in embankment measure. This is shown and explained on this exhibit, 17-G.

Very shortly after the embankment operations were closed down for the 1939 season, the contractor asked the construction engineer that he wanted



to know the designated areas from which barrow pit excavations would be made for the 1940 construction season. In the letter dated January 5th, 1940, the contractor made such a request and the construction engineer's letter of January 1589 22nd, 1940, replied that it was the intention to secure the material for the cobble fill from all cobble larger than five inches obtained from earth barrow pit materials and that if there was a deficiency of cobbles after this that the excavation, to supply this deficiency, would be secured from the cobble barrow pit.

Mr. Shields: I am going to object to his recounting the contentions of these letters; the letters themselves are the best evidence of what is in them.

Commissioner Evans: Objection overruled; it is merely a foundation. Go ahead.

The Witness: (Continuing) The investigations and the proposed plan of operation from barrow pit number two—embankment barrow pit number two—and as a result of these tests I have previously described, it was decided that to properly construct the embankment during 1940 and secure the type of materials that were needed for the various zones of the embankment, most of the excavations would be made from areas one, two, seven and eight. Exhibit No. 17-C shows that excavation was actually made in these areas; most of the excavations coming from area number two, area num-

ber one, and area number six, with only a small quantity from area number eight and area number seven.

The results of these tests, as I have explained, showed by taking the average of all pits excavated in each one of these areas, that area number one contained a larger percentage of cobbles than any of the other areas, amounting to 13.6% by volume. Area number two, which was to be taken in two cuts—the first cut, which consisted mostly of glacial till, contained 6% by volume of rocks larger than five inches in diameter; the second cut, as determined by test pit data, contained only 2.8% by volume; area number seven 6% and area number eight 13%.

It was shown very conclusively by these test pits that the material in area number one contained a larger percentage of plus-five inch cobbles than the other areas in the pit.

The specifications, under paragraph 55, provide that all stones larger than five inches in diameter shall be removed.

Mr. Shields: I object to his telling what the specifications are.

Mr. Sweeney: He is not; he is only indicating to the Court and to Your Honor, please, where these five-inch stones are coming from.

Commissioner Evans: A certain amount of this may be necessary. He may proceed.

Mr. Shields: I say that we are not bound by his statement as to what it provides.

Commissioner Evans: Definitely you are not bound by this testimony. It does not alter or effect the contract.

The Witness: (Continuing) The specifications, number 55, require that no stones having  
1591 maximum dimensions in excess of five inches be placed in the earth fill portion of the embankment and such stones that are removed from the embankment will be placed in the cobble fill portion of the embankment.

There were a number of letters exchanged between the Construction Engineer and the Contractor over the controversial point during the winter of 1939 and '40. I think most of these are in evidence.

The sum and substance of it was that the Contractor wanted payment as cobble barrow pit for all excavation that was to be made from earth embankment, barrow pit number two, while the government could only make payment under schedule item number 14 at 23c per yard for earth embankment barrow pit excavation.

On March 29, 1940, after all of the exploratory work had been completed and assembled and copies of the logs of the test pits—I don't remember the exact date, I think it was little later than this—were supplied to the Contractor.

Q. 1058. April 26, 1940. A. This data was being assembled at the time we had completed the exploratory work. In March, 1940, Mr. Bahmeier and

I had a conference with Mr. Stewart relative to his operations of barrow pit number two for the 1940 construction season. Mr. Stewart asked where he should locate his screening plant. He was advised by Mr. Bahmeier in my presence that it was not the concern of the government where he moved his screening plant to or whether he used his screening plant or not; that all we were concerned

about was that the materials coming from 1592 barrow pit number two be placed in accordance with the provisions of the specifications and all stones larger than five inches must be removed. In other words, if he chose to do this by a screening plant method that was satisfactory or if he chose by some other method that was satisfactory as long as the embankment was placed in accordance with the provisions of the specifications.

These logs were, as previously explained, (copies of these logs) submitted to the Contractor with the letter of April 27, 1940, from the Construction Engineer to the Contractor—dated April 26, 1940—also again told the Contractor that it was his responsibility as to how he removed the rock which was oversized from the materials excavated from the earth embankment barrow pit and the government had no intention of making payment for the materials other than under schedule item number 14 and for placing these materials in the embankment in accordance with the applicable provisions of the specifications.



During the early part of April, 1940, Mr. Burns, Mr. Bahmeier and myself, representing the government, went over the entire area of barrow pit number two with Mr. Wunderlich and Mr. Stewart and discussed the types of material that would be encountered in each of the various parts of this pit. We talked it over, walked over the entire barrow area, looked at the test pits, looked at the rocks that had been removed in the screening performed by government forces, and discussed the operation

of the pits. The Contractor was advised of 1593 the different types that would be encountered and the zones in the embankment for which these materials were suitable. To the best of my recollection, there was no discussion, during this conference, as to how the Contractor proposed to remove the oversize stones.

The Contractor's letter of April 29, 1940, to the Construction Engineer protested the decision of the Construction Engineer's letter of April 26th— and said that this protest was filed in accordance with paragraph 14.

Embankment placing operations for the 1940 season were started on March 28, 1940, and on this same day the Contractor started dismanteling the screening plant from its previous location. (I might explain here that during the 1937, 1938 and 1939 seasons, the plant was located downstream of the embankment and to the immediate left of the spillway and outlet channels. It was used in this loca-

tion for the screening of all required excavations that required screening, from the spillway excavation, from the outlet works excavation, the cut-off trench excavation and the diversion channel excavation. These excavations, at the beginning of the 1940 season, had all been completed.) Therefore the Contractor started dismanteling its plant on this same day, March 28th, apparently in preparation for moving it to another location as he apparently intended to set it up to screen the materials or some of the materials coming from barrow pit number two. During the period of April 5th to May 11th, 1940, the Contractor used a small crew of men and a small amount of equipment excavating  
 1594 for and erecting the screening plant and constructing a ramp up to the screening plant. The plant was left somewhat similar to what it had been for operations in previous seasons except the conveyor belt was eliminated; the plan of operation was for trucks to haul up a ramp to above the screening plant, dump the materials in a chute and this chute would feed the materials into a scalper which would scalp the materials, scalp over-large stones, plus 13 inch stones; would remain in the material, the material would come down to a vibrating grizzly which had wide bars just the same as they had been spaced the year before and two and a half inches in the clear and there it would be separated, that is, separated into material that would pass the screen and material that was retained on the screen.

This set-up of the screening plant was completed far enough that, on May 12th there was a short test run made and it was supervised by Mr. Wunderlich personally. If I remember correctly, Mr. Stewart was not there when this test run was made. I ran into him up at the rock barrow pit seven miles up-stream and asked him how the plant was working and he told me, as I remember it, he didn't know exactly. Shortly thereafter, after this test run was made which consisted, as I found out later, of putting five loads of material in the plant, I visited the plant and looked it over and it was easy to see that the reason the plant wouldn't work was, as it was then constructed, the material that came down the chute had large boulders in it which wedged and blocked the passage of the material and the material would not feed through. It wasn't going to operate satisfactorily as it was then constructed.

1595      On the morning of May 13th, Mr. Wunderlich came up to the office and conferred with the Construction Engineer and stated that the screening plant as it was then constructed was not capable of handling this material and he was leaving immediately for Denver to discuss the screening operation with the Denver office. Mr. Wunderlich did come into the Denver office and discussed with the engineers in Denver—a conference was held in the Denver office on June 6th, 1940, between Bureau of Reclamation engineers and rep-

representatives of the Contractor. I was not in attendance in this conference but Mr. Bahmeier was and testified to this conference yesterday. Through reports and correspondence I know what took place in the conference and I am going to refer to it here so as to develop—

Mr. Shields: I am going to object to that as notes taken from other sources.

Commissioner Evans: You will have to leave out any reference to hearsay.

The Witness: (Continuing) With the Construction Engineer's letter of June 10th, 1940, to the Contractor was submitted order for Changes Number Two. This order for Change Number Two was submitted as a result of this conference held in Denver on June 6th, 1940, to which Mr. Bahmeier testified in his testimony previously.

The order for Change Number Two proposed to set up the area designated as area number one as a cobble barrow pit in lieu of the cobble barrow pit shown on the specification drawing.

1596 Commissioner Evans: You are referring to area number one of barrow pit number two?

The Witness: Two; correct.

Mr. Shields: That area is shown on what paper?

The Witness: That area is shown on Defendant's Exhibit No. 17-C.

Mr. Shields: Okay.

The Witness: (Continuing) The reason that it was proposed to set this up as a cobble barrow area



was that in our studies it had been determined that it was believed that most of the cobbles needed could be secured from this excavation, and that it would not be necessary to go to the cobble borrow pit that was so designated in the specification drawing to secure any deficiency of cobbles that remained after all other excavation operations were complete.

It was proposed to set this up as a cobble borrow pit, pay the contractor under schedule item 16 at 35c per yard for the material that was taken from this pit and pay overhaul in accordance with that set up for cobble borrow pit. It was also stated that it was anticipated to take approximately 250,000 yards out of this area that would be paid for under item number 16; the specifications had set up only 50,000 cubic yards to be taken from the cobble borrow pit as designated in the specifications. This would amount to an increase in additional compensation to the Contractor of approximately \$40,000.

The Contractor rejected this proposal and made a proposal of his own which is covered, I think, in some of the correspondence that is in evidence. That was not acceptable to the government and would not be accepted by the government.

Following these conferences in Denver, no agreement could be reached with the Contractor and it seemed that the Contractor would not accept

Change Order Number Two; the government would not accept the proposal made by the Contractor and it was therefore concluded that the only basis for proceeding with the work was to issue the Contractor a Form "B" Order which directed him to proceed with the work and to present any claim for additional compensation that he had within ninety days of the date of order.

Commissioner Evans: Let us note a recess.

(Recess)

Commissioner Evans: The hearing will be in order.

The Witness: (Continuing) The Contractor, at a later date, asked for an extension of time and this was granted which gave him a total of 120 days.

Commissioner Evans: After the Form "B" was issued?

The Witness: The Form "B" was extended to the Contractor — sent our letter, I think the date of the Construction Engineer's letter was October 7th, 1940, sent to the Contractor with the Form "B" order. I would like to make a correction in a statement that I made in the early part of my testimony.

I think I stated that the excavation in barrow pit number two that was excavated in 1938 as coming from—as being on the right side of the river and it should be on the left side of the river.

The Contractor, in this first initial set up that they had made in the screening plant, had

1598 moved their vibrating grizzly over and put it in a new location exactly as it had been in separating the required structure excavation. The provisions of the specifications on that provided that the bars should be spaced at two and one-half inches in the clear. The Contractor had been advised that we only required the material coming from barrow pit number two to have the rocks larger than five inches removed. He had left the grizzly as it had formerly been which would have separated on a two and a half inch basis.

Following these conferences in Denver, the Contractor then proceeded to remodel the screening plant. This took place during the period June 13, 1940 to June 21, 1940. The design of the plant, as it was then installed, was changed considerably; the Contractor installed a short section of conveyor belt, put in the feeding hoppers that had been used in the initial set up of the screening plant in 1939, and made a number of changes in it such that it looked like the operation would be satisfactory.

The remodeled screening plant was placed in operation on June 21, 1940, and was used thereafter for the remainder of the 1940 season for screening practically all material that was excavated from barrow pit number two. There were a few times when the plant would be shut down for some repairs or for some reason or other it wasn't in operation and some materials were hauled directly to the embankment and the rock removed as had been

done during the 1939 season; however, after this date of June 21, 1940, substantially most of 1599 the material from the barrow pit excavation was put thru the separating plant. The separating plant, as it was set up at this time, was designed with the idea that it would handle excavations from both the Lima shovel and the Lima dragline excavating simultaneously in the barrow pit. As the operation proceeded, there was only about half of the time that both machines were actually excavating from barrow pit number two; thus during the time that only one machine was operating, the plant was running at about fifty percent of its maximum capacity. Although, during fifty percent of the time that the plant was running, it was handling material coming from one machine, the cost of operating the plant remained practically constant such that the cost of separating was considerably higher when only one machine was in the pit than it was when two machines were in the pit.

The excavation from barrow pit number two was started in April 1940, about the 22nd. I might say here that, although embankment placing operations had been in progress some little time previous to this, they consisted mostly of placing material in the temporary diversion channel.

The Contractor effected the second diversion of the river along about the first part of April and all placing operations were thereafter concentrated in filling the diversion channel and making this safe



so that the increased lake level would not have any possibility of seeping through this area. Thus it was not necessary to go back to barrow pit number two until April 22.

1600 During the period April 22nd to June 21st, 1940, during the period that the Contractor was setting up the screening plant and also remodeling the screening plant, the removal of the plus-five-inch stones on the embankment, as required by the specifications, was done by the same procedure it was done in the fall of 1939; that is, using this rake dozer raking the rock material out of the material over into the cobble filled portion of the embankment. This method had been used during November 1939 and it was used until June 21, 1940. The removal of the plus-five-inch stones by this method was not very satisfactory. There was a large quantity of oversize stones that was left in the embankment materials, covered up. This resulted in extreme difficulty in securing maximum compaction with the sheep's-foot rollers and also this method of removal was responsible for a lot of the fine material being shoved over into the cobble filled section of the embankment.

After the screening plant was placed in operation—that was on June 21st—the plant operated very satisfactorily; there were many times that both machines were excavating and materials were being screened at a rapid rate. They continued the operation on a two-shift operation basis the rest of the season up until November 7th, 1940.

At this date, the Contractor had placed the embankment to an elevation to where it brought the greater portion of the length of the dam—the earth filled portion of the embankment—as required by the specifications; it had been completed to the required elevation?

1601 The Contractor had also stockpiled in a road ramp at the left abutment of the dam immediately upstream from the dam a sufficient quantity of screened materials that they estimated would be sufficient to complete the remaining portion of the earth embankment. That was needed; that is, it would be done in 1941.

Following this, during the next two or three weeks, the contractor dismantled the plant from its location in the barrow pit and moved it out of the area. This was done because, as the lake level came up the following spring, this entire area would be flooded and he desired to dress up the bottom of the pit, to take cross-sections and get everything in it cleaned up before the lake level came up the following spring.

There was a total of 846,891 cubic yards of material excavated from the earth embankment barrow pit two during 1940 and payment was made at 23c per cubic yard under item 14 of the schedule.

Of this quantity, approximately 266,000 cubic yards of material was excavated and placed in the embankment previous to the time the screening plant was placed in operation and rocks removed

by this hand picking and rock-rake method on the embankment. The remaining quantity of approximately 581,000 cubic yards, for the most part, was put through the screening plant. Payment was made to the Contractor for placing of these materials in the embankment at the bid price of 50c per cubic yard in the earth filled portion of the embankment and 15c a yard in the cobble filled portion of the embankment.

1602 During the 1940 construction season, a total of 109,927 cubic yards of cobble fill was emplaced in the embankment and was paid for under the applicable item of the schedule. Most of these cobbles came from barrow area number two; there was a small quantity that came from barrow pit number one and was removed on the fill by hand picking but most of the cobble that was placed in 1940 came from barrow area number two.

During the investigation work that was in process in the fall of 1939, the government conducted some tests to determine the void factor in cobbles in embankment. Very careful tests were run and it was determined that 38% of the area in the cobble filled section was voids. By applying this void factor to the yardage that was placed in the embankment during 1940 in the cobble filled section and comparing this with the total excavation that was made in barrow area number two during 1940, it gives us a figure of 8% of cobbles that was removed from all materials excavated from barrow

pit number two during 1940. Test pit data had previously indicated that the area number one in this barrow pit contained a higher proportion of cobbles than any of the other areas and this is the area that was proposed to the Contractor to set up as a cobble barrow area; by eliminating a portion of the material excavated from area number one we arrive at a figure of 6.3% cobbles for the remainder of all excavations made excluding area number one of barrow pit number two.

There was the second cut that was taken through area number two of this barrow pit which 1603 consisted of appreciable amounts of material excavated from the whole pit that contained less than three percent cobbles. The materials in this second cut consisted of sand and gravel and in every respect was similar to the material that was excavated from the scattered barrow sub-pits in barrow area number one that are involved in claim number one. These materials could have been placed very successfully in number one and number three zones of the embankment with only a very nominal amount of rock removal on the fill and could have been done more economically than by screening the material; however, the Contractor elected to put this material through the screening plant and this operation was satisfactory as far as the construction of the embankment is concerned and he was permitted to do it. In other words, the method of removing the plus-five-inch stones from



the embankment materials from earth barrow pit was strictly the Contractor's responsibility and the government did not care how he did it as long as it was done in accordance with the provision of the specifications. If the Contractor elected to put the material through the screening plant that could have been placed without putting it through the plant, that was his choice.

Mr. Shields: I think the witness is wandering from a statement of facts and getting in conclusions.

Commissioner Evans: Please stick to the facts.

The Witness: (Continuing) During the period of October and November, 1940, government 1604 engineers made some studies; this was done by me and under my direction—of the cost to the Contractor of screening materials at the screening plant and the studies were made to determine the amount of increased hauling time required by reason of putting material through the screening plant instead of hauling directly to the embankment; also some studies were made of the cost during the period May 29th to June 21st inclusive as to the cost to the Contractor of removing the plus-five inch rock on the embankment as was done during this period previous to the time the screening plant was placed in operation. These studies are covered completely in this report which is Defendant's Exhibit 17-E, and are supplementary to letter dated May 5, 1951, which is Defendant's Exhibit 17-F-1.

It was determined, as a result of these studies, that the actual cost to the Contractor of removing plus-five inch rock on the fill amounted to approximately three cents per cubic yard. It was also determined that the average cost of removing plus-five inch stones, based on these studies, for all material removed from Barrow pit number two during 1939 and 1940 amounted to approximately six and a half cents per cubic yard.

The detailed portion of these costs are contained in this exhibit.

The Contractor was paid at five cents per cubic yard for placing of embankment in the earth filled portion of the embankment. Included in this five cents, or included in the work that was to be done under this provision in the schedule item is the spreading of the material on the embankment, removing five-inch stones that come in from the embankment, securing optimum moisture content in the materials—that is, sprinkling if it is necessary—and doing whatever processing is necessary for the materials and rolling them with the sheep's-foot roller twelve times to secure maximum compaction.

It will be noted that a portion of this cost includes the removal of a nominal amount of five-inch or plus-five-inch stones from the materials. Therefore it is felt that some portion of the cost of removing all five-inch stones, as is reflected by these figures, should be credited—

Mr. Shields: I object to that as a conclusion. He is not stating facts.

Commissioner Evans: The witness is about to give you credit for something. Are you explaining how you arrive at the cost?

The Witness: How we arrive at these and what was figured.

Commissioner Evans: Go ahead.

The Witness: (Continuing) In other words, after arriving at this six and a half cents a cubic yard, there should be a small portion of this five cents per yard credited to that which would probably bring it down to five or five and a half cents per cubic yard added to his haul cost of performing this additional work by the Contractor.

The initial statement of claim of the Contractor was received in the project office on December 28, 1940. This was the statement of claim for 1606 additional compensation under order for changes number three; this totaled \$334,994.42. This statement did not have detailed matter showing the hours of operation of equipment and hours of labor and it was returned to the Contractor by the Construction Engineer with a request that it be restated in sufficient detail that it would permit checking by the government engineers.

The Contractor resubmitted in detail the statement of claim under date of April 8, 1941. The total amount claimed had been increased to approximately \$30,000 to \$366,924.39.

The Contractor also submitted, with his letter to the Chief Engineer of June 23, 1942, a revised statement of claim which was in the amount of \$389,923.78. However, the amounts in the release on contract was as the second statement; that is, \$366,924.39.

A proposed adjustment for compensation was submitted to the Contractor by the Contracting Officer on June 16—dated June 16, 1941, and proposed a lump sum payment to the Contractor of \$44,208.85 for additional work that was performed in the barrow pit.

Mr. Shields: You were getting the cobble from a so-called pit and additional work for only—

The Witness: \$244,208.85 as the amount of additional compensation that the Contracting Officer had found as equitable and proposed to the Contractor for performance of the work required under order for Changes Number Three.

It had been found in making the study of the Contractor's claim dated April 8, 1941, that the amount of labor shown, the cost of materials 1607 and the hours of operation of equipment were substantially in agreement with the government records.

A few items of equipment had been included in this statement of claim which was found could not be allowed; that was a sheep's-foot roller and the tractor—the number of tractor hours required to pull this roller. This was not allowed because the



rolling in the embankment was done irrespective of cobble content in the barrow pit and was found not to be an item that should have been in this statement.

The allowances for use of equipment were found to be greatly in excess of what was considered a reasonable rental allowance by the Contracting Officer.

The order for Change Number Three had set out that the Contractor would submit its statement for claim for doing additional work; it was not anticipated that the contractor would make claim for the entire operation for excavating the material from the earth embankment barrow area number two and then deduct the amount that had been paid and consequently all cost studies that are included in this report—Exhibit No. 17-E—were made on the basis of only the additional work that was done by reason of separating the plus-five-inch rock from the materials excavated, part of which is a contract obligation in the placing of the embankment.

However the Contractor made his statement of claim and covering all operation in the barrow pit and the Contracting Officer found that it could, by applying the rental allowances that the Contractor considered to be fair and equitable, arrive at an equitable adjustment and therefore computed the adjustment for compensation for order for changes Number Three on this basis.

I would like to refer to a couple of pages in this report, Exhibit—Defendant's Exhibit 17-E. It will

be noted on page 51 of this report that it is given that the cobble recovery from all materials excavated from barrow pit number two during 1940 is 12.36% in embankment measure of cobbles; this includes the 36% voids that are in the cobble fill. This figure tallies exactly with the approximate percentages that I have used, when allowances are made for the voids.

The same is true for the computation in arriving at a figure of 10% if area number one is excluded. That is, if this is correct, to allow for the voids in the cobbles, it comes down to approximately 6.2% as measured in solid excavation, as the material is in the barrow pit. In other words these figures shown in here in paragraph 42 of page 51, are in embankment measure.

The photographs included in this report show average conditions and in considerable details—the pictures of the screening plant.

It will be noted in the paragraph on page—photograph on page number 12 that there is a large pile of cobbles, that is, large cobbles, on excess of 13 inches in diameter lying in front of the screening plant. These rock were separated from the 1609 material by a scalping grizzly and allowed to fall in a pile and the Contractor moved a shovel into this area once a week and loaded out these larger rock and hauled them to the cobble section of the embankment. Those were allowed to accumulate over a considerable period before being removed.

The photograph on page 30 of this exhibit shows the results of screening the material excavated from a test pit approximately four feet by four feet by ten feet deep in the number one zone of the embankment from which the plus-five-inch stones had been removed on the embankment by means of a rake dozer.

Commissioner Evans: You made a test pit in the embankment?

The Witness: In the embankment; yes, sir. The purpose was to determine what percentage of plus-five-inch stones were still remaining in the embankment after the contractor had presumably removed them all previous to rolling.

Mr. Shields: You mean from an area not in the cobble part of the embankment, in the earth part of the embankment?

The Witness: Number one zone which is the earth part of the embankment, upstream zone.

The pile of rock at the extreme right hand corner of this picture are all stones larger than five inches in diameter which, under the provisions of the specifications, should have been removed before the rolling was accomplished.

This pit is ten feet deep in the completed portion of the earth embankment. In other words, this picture shows that the work was not being performed satisfactorily and was the reason for many  
1610 of the re-rolls that were necessary to secure maximum density.

Mr. Shields: I object to that as a conclusion of the witness.

Mr. Sweeney: Those are not conclusions, they are facts.

Commissioner Evans: They pertain, whatever they are—they pertain, do they not, to some claim other than seventeen?

Mr. Shields: Yes, sir.

Commissioner Evans: Objection overruled.

Mr. Shields: Exception.

The Witness: (Continuing) The rock, in other words, are shown, pertaining to claim 17, that they were performed—in the removal of the stones on the embankment by this method was not satisfactory and later resulted in some of the other claims—

Mr. Shields: Same objection.

Commissioner Evans: Overruled.

Mr. Sweeney: Many of these claims, if Your Honor please, are overlapping. Sometimes 2, 3, or 4 of them overlap.

Mr. Shields: Exception.

The Witness: (Continuing) The photograph shown on page 34 is a panorama view of barrow pit number two looking from the opposite side of the lake. The embankment is shown at the extreme right hand side of the picture; the screening plant in the left hand side of the right photograph of this panorama view and the barrow pit, number two, extending down through the central portion of the foreground.



Mr. Sweeney: Mark that, please, for His Honor.

(The witness complied.)

1611 The Witness: (Continuing) I have marked on photograph on page 34 of Exhibit 17-E a pen line indicating location of barrow pit number two and also the location of the screening plant and the dam.

Photograph shown on page 36 of Exhibit 17-E shows the face of a cut in the upstream end of barrow pit number two from which excavation was taken; it shows the face of a cut which extends approximately fifty feet high.

This excavation was made in two cuts. This is representative of the materials excavated in this area.

The other photographs are representative of excavation operations in barrow pit number two and placing of the materials from barrow pit number two in the embankment and of the operation of the screening plant.

Q. 1059 At this time, please refer to Defendant's Exhibit 17-D, pages one to twenty-seven. What do the photographs show so far as it ~~might~~ be necessary to reflect in regard to claim 17?

Commissioner Evans: Weren't those photographs shown on Saturday?

Mr. Sweeney: They were covered but I am asking now as some of them will illustrate matters.

A. All of the photographs that were included, that is, from Exhibit 17-D, pages one to twenty-

seven, are photographs covering representative operations in this barrow pit and emplacing embankment materials that were excavated from barrow pit number two. These show—there are a considerable number of photographs, the earlier ones 1612 in here that were taken in area number one, which is the portion of this pit that contained the most cobbles; some of them extend on down through later operations into area number two—the second cut of area number two which contained the least percentage of cobbles. I think these cover most of the photographs that were taken for progress in this barrow pit during this period.

I think, although there are a number that are not in here, those pertained to other things other than this barrow pit.

Photograph 450 was taken in 1941.

Commissioner Evans: Which page is that?

The Witness: Page 28 of Exhibit 17-D. This is not in barrow pit number two but was later designated barrow pit number three and is the area shown on specification drawing 191-D-45 as a cobble barrow pit area.

Mr. Shields: Mr. Witness, you wouldn't be understood to say that represented any excavation in the area you are talking about?

The Witness: Represented excavation?

Mr. Shields: Yes.

The Witness: The excavation was made here right back through to where the shovel is.

Mr. Shields: That photograph doesn't represent the excavation made in that area though, does it?

The Witness: The shovel made the excavation at the time—

Mr. Shields: The rocks there are the rocks that were left there after you took the rocks out of the excavation—

1613 The Witness: I think I know what the Plaintiff's Attorney is driving at. As the excavation was made in this area, the larger of the stones that could be kicked aside were left in the pit because they were not needed on the embankment and were not desired.

Mr. Shields: That's right; it is not a picture of the excavation but waste cobbles after getting the excavation.

The Witness: It is a picture of the excavation as the last part of the excavation was being made.

Q. 1060. (By Mr. Sweeney) I show you, please, Plaintiff's Exhibit D, an appeal from the Contracting Officer's decision. Refer to the photographs contained in it relating to Claim 17 and tell His Honor if those photographs are representative of the typical conditions.

Commissioner Evans: Which Exhibit is this?

Mr. Sweeney: Plaintiff's Exhibit, his appeal—Plaintiff's Exhibit D.

Commissioner Evans: All right.

A. These photographs have no dates or no titles on them and therefore it is possible—it is not possi-

ble exactly to identify them; but they do represent apparently—they have been taken in barrow pit number two but they do not represent average operating conditions there. They are picked out to show some specific picture.

Q. 1061. Can you identify the photographs to which you refer by page or number?

1614 The Witness: Plaintiff's Exhibit D. The photographs—may we go off the record?

Commissioner Evans: Off the record a moment.

(Whereupon there was unrecorded discussion.)

Commissioner Evans: On the record.

The Witness: They are under Exhibit Y of the Plaintiff's appeal.

I won't go into each one of these photographs because I think I can make some general statements.

Most of these have been taken where it was a common practice that where a large boulder was encountered to set that aside with the shovel and leave it lay in the pit unless it was obstructing other operations and in some cases the contractor, in order to get some of the larger boulders out the way, picked those up and hauled them and placed them in the cobble filled portion of the embankment, which was quite a ways from the borrow pit, and they were not paid for that only as earth embankment borrow pit prices.

There are a number of photographs here that show one extremely large boulder in the picture. This was encountered but it was not an average.



condition. I think this was the only boulder encountered in the whole borrow pit that was anywhere near this size. The same is true of photographs showing placement operations of the embankment.

Most of these photographs are taken so as to show the large cobbles that were removed 1615 from the material in placing and raking them out after they had been windrowed up. In other words, after they had been windrowed up the picture was taken of the windrow.

Mr. Shields: They were government pictures, weren't they?

The Witness: Those are not.

Mr. Shields: Are you sure of that?

The Witness: I don't think these are. I have no way of knowing whether they are government pictures. The Contractor took some pictures on the job.

Mr. Shields: You got them from us?

The Witness: You might pick out a lot of government pictures. This picture I testified to previously which shows the screening plant, shows a large pile of boulders in front of the screening plant that are the boulders that were scalped over by the scalping grizzly. This pile of boulders possibly represents a week's operation, may be less than that.

The photographs taken of the test pits are pictures of test pits in area number two that were excavated by government forces and all of the mate-

rial coming from the pit was screened. In one pile was put all material that passed the three-inch screen; the rocks retained on the three inch screen but passing a five-inch screen in another pile; the rocks retained on the five-inch in another. It will be noted that practically all of these 1616 photographs have the plus-five-inch rocks in the foreground such that it looks like the cobble — average cobble content is considerably higher than it actually was.

I don't know that these test pits that are shown here are test pits from which the excavations were actually made of it. There was a large area that was explored here that was not used; excavation was not actually made in it.

Q. 1062. Mr. Walton, please, with respect to the original cobble area pit that was shown on drawing 45 of Defendant's Exhibit F, have you explained to the Court whether or not the Plaintiff removed any material from that cobble barrow pit and the reasons why, if he did? A. The Contractor removed approximately five thousand yards of material from what we designated borrow pit number three which is shown on drawing "Cobble Borrow Pit Area." This material was removed to secure earth materials to complete the embankment during 1941 after the Contractor had allowed a portion of the materials that were stock piled for this purpose to become flooded. This excavation was made, not to secure cobbles, but to secure earth materials.

Commissioner Evans: Was that the only excavation made from the cobble pit area?

The Witness: All that was made from this cobble pit area as shown on drawing 191-45-D.

Q. 1063. (By Mr. Sweeney) Just a few more questions touching Mr. Wunderlich's Claim 1617 17. Tell His Honor please, with respect to area number two—in area number one in pit two if it was designated as a source of cobble material in this order for Changes Number Three? A. Two.

Q. 1064. Number two, but with respect to the hauling distance; the free haul distance 2400 feet. Tell His Honor whether it was longer or shorter than the haul from this pit to or as compared with the haul from the embankment to the original cobble area that you have noted as number three. A. In the proposal that was made to the Contractor in order for Change Number Two of setting up area number one of the earth embankment barrow pit area number two as a cobble borrow pit in lieu of the cobble barrow pit shown in specification drawing, the Contractor proposed to pay the—the Contracting Officer proposed to pay the Contractor under schedule item 16 for the excavation of approximately 250,000 yards of material. The over-haul provision, as set out to cover excavation from cobble barrow pit, was to also be applicable to this portion of the pit. The cobble borrow pit was set up for a free haul limit of 2500 feet. Earth embank-

ment borrow pit was set up for a free haul of 5,000 feet. The free haul from area number one to the embankment is comparable, possibly just a little longer than it would have been from the cobble barrow pit area.

Q. 1065. Area number one of barrow pit number two? A. Area number one of barrow pit number two, Exhibit 17-C.

1618 Q. 1066. Will you tell His Honor please, did the Plaintiff ever make any claim with regard to the over-haul of this cobble? A. The initial claim that the Contractor submitted for the excavation that was made in 1939 claimed payment for cobble borrow pit and also over-haul. The submission of claim covered 1940 and was made on a labor-equipment-operation basis. I don't know whether it included over-haul or not.

Q. 1067. Sometime about the latter part of July or the first of August and with respect to the negotiations that were being carried on between the parties regarding this matter, to your own knowledge did Mr. Wunderlich ever threaten to stop all the work in there unless an agreement was consummated touching this? Did you ever hear of Mr. Wunderlich stopping work or threatening to stop work? A. You mean the entire work?

Q. 1068. Just with respect to this operation regarding this order for Change Number three? A. No, sir; I never; not to my knowledge.

Q. 1069. What did the Plaintiff have to do, if anything, with regard to excavation of materials



in pit one? A. Pit one was used as a source of practically all materials in 1938 and 1939. Pit one consisted mostly of silt and clay extending to bed rock or underlain with strata of sand and gravel. The lower portion of barrow pit number one consisted mostly of sand and gravel. This sand and gravel contained only a small amount of oversize rock and what oversize rock was encountered was removed by hand picking methods just with hand labor.

Q. 1070. With regard, please, to the estimate, what quantity of cobbles in this new cobble area, which was area number one of pit two, tell his Honor, please, if the government engineers refused to—first, tell His Honor, did Mr. Wunderlich request such information, to your knowledge? A. I don't quite get that question.

Q. 1071. Did he ask you to give him information with regard to percentage of cobbles in this new cobble area? A. I don't know exactly. I think possibly he might have asked Mr. Burns.

Mr. Shields: I object to what he thinks.

By Mr. Sweeney:

Q. 1072. Tell His Honor what you know first, and tell His Honor if, in the letter of April 27, 1939, submitting the logs based upon the exploratory, would that give information as to percentages of cobbles? A. It stated the type of material that was encountered, the complete logs of the pits; it did not

give results of screening carried on by government forces.

Off the record, please?

Commissioner Evans: Off the record.

(Whereupon there was off-the-record discussion.)

By Mr. Sweeney:

Q. 1073. Plaintiff has testified that the hauling distance from area number one, pit two, as compared with the hauling distance from the 1620 original cobble pit to the embankment was three or four times as long. Tell His Honor what the facts are, touching that, if you haven't already covered that.

Mr. Shields: May it please the Court, Plaintiff never testified about area one at the beginning or at the end or at any other time about the distance from area one. We knew nothing about area one.

Mr. Sweeney: We submit that possibly Mr. Shields didn't know what it was.

Commissioner Evans: Off the record.

(Whereupon an unrecorded discussion was had.)

Commissioner Evans: Let the record show that the correction desired by Counsel for the Plaintiff pertains to the designation of area one; that the testimony did not refer to area number one but pertained to hauling distance from barrow pit number two. Do you understand the question?

The Witness: I understand this; I believe. I want to know if I am answering about the total of bar-

row pit number two or only area one in barrow pit two?

Q. 1074. (By Mr. Sweeney) In testimony for the plaintiff Transcript, page 274, Cross Question 1320 —“Whereas you excavated a very large quantity of material from borrow pit number two, didn't you?” Answer, “Yes, but borrow pit number two was much more expensive than the cobble borrow for us to move.”

Question, “Why was it more expensive? You were already in it.” Answer, “It was a much longer haul?”

Question, “Just for the longer haul?” Answer, “Yes, but it had to be processed just the same as cobble borrow. You had to put the material through a separating plant the same as you did cobble, and this number two pit was three or four times as long a haul and therefore it was a lot more expensive,” now we only want you to tell His Honor, what are the facts touching that? A. The haul distance from center of borrow pit number two as compared with the haul distance from the center of cobble borrow area, as set out in specifications, is longer. The haul distance from center of gravity of area one of barrow pit two as compared with haul distance from center of gravity from cobble barrow area as set out in specifications are approximately the same.

Mr. Sweeney: That is all.

## Cross Examination

By Mr. Shields:

XQ. 1075. But the government measures distances in an airline and not by the route actually traveled? A. The government measures distances provided in the specifications by airline.

XQ. 1076. Straight line; not as traveled? A. Depends on what it's for. If it's measured for over-haul, it's air line.

XQ. 1077. This would be a question of over-haul? A. For over-haul it would be measured by the horizontal distance between the center of 1622 gravity in the embankment and the center of gravity of the barrow pit.

XQ. 1078. So that no matter if we went ten miles around and a quarter of a mile across you would take the quarter of a mile across. A. Just the same as it is set out in the specification—from center of gravity to center of gravity.

Commissioner Evans: We will take a recess for lunch until 2 o'clock p.m.

1623 (Pursuant to recess heretofore taken in the hearing of this cause and noted in the record, the taking of testimony was resumed at 2 o'clock p.m., of this date, and thereupon further proceedings as hereinafter shown were had.)

By Mr. Ruddiman:

XQ. 1079. In connection with Defendant's Exhibit 17-E, I believe you testified that you kept costs on the removal of five-inch rock from the em-



bankment by means of a rake dozer? A. During—pardon me.

XQ. 1080. And that that cost amounted to slightly over three cents a yard. Will you tell the Court what period it was that you kept those costs? A. I will have to refer to the exhibit to tell you.

(The witness refers to a document.)

A. (Continuing) That was from—this was just kept during a representative period in order to arrive at a figure. This was during the period of May 29, 1940, to June 21, 1940, about thirty days; and this same rate which figures out, on using this other—figures out to 2.96c per cubic yard. It was then applied to the entire yardage from which the plus-five-inch rock were removed by this method during 1939 and 1940. This is a representative period; it was average conditions; the material coming from area number one and the first part of area number two; borrow pit number two.

XQ. 1081. Does that three odd cents represent the cost of removing rocks over five inches on the embankment with a rake dozer? A. The cost, 1625 as shown there of approximately three cents per yard, covers the cost of removing the plus-five-inch stones from the embankment materials that were hauled in during this period from borrow pit number two on the embankment.

In this figure, only half the time of the scratch dozer has been allowed to the removal of the plus-five-inch stones, as this dozer was used to spread

the materials and scarify the surface of the lifts as well as to remove the plus-five-inch stones.

This includes the entire cost of labor—that is, hand picking.

XQ. 1082. Did you also keep costs on the cost of operating the screening plant in connection with Exhibit 17-E? A. Yes, the cost of the operation of the screening plant during the period June 21, 1940, to November 6, 1940, which amounted to four months and fifteen days, we did keep costs on the operation of the screening plant.

XQ. 1083. What was the unit cost that you got on that? A. As shown on Exhibit 17-F-1, which I explained in my testimony, that was revised figures for the four in here. We have a figure of 8.59c per cubic yard. That was for the screening of 591,417 cubic yards of material.

XQ. 1084. Did I understand you to say on direct testimony that that was six cents, or slightly over six cents? A. I don't think you did.

XQ. 1085. Well, you said— A. You under-  
1626 stood me to say, on direct, that six and a half cents a yard was the average cost of removal by all methods during 1939 and 1940, I believe.

XQ. 1086. How did you arrive at that average? A. That average was by taking the total cost of screening, which was \$61,000, which arrives at—no, I beg your pardon. The total cost of screening, which was \$50,810, plus the cost of removing, at

three cents per cubic yard, the stones on the embankment; that is by the use of the rake dozer, for 346,000 yards of material, giving a total of \$61,067 and dividing this by 837,996 cubic yards of material, the total of which was placed, which gives us 6.50c per cubic yard.

XQ. 1087. Where did you get the rate that you used for equipment rental in connection with the Plaintiff's Exhibit 17-E? A. The rate that was used for equipment rental were rates that had been submitted to the project office by the Denver office for use in connection with this order for Change Number Three. A short time after I prepared that report, we received a revised rate and that was this Exhibit 17-F-1; the same data in that report but using the later equipment rental rates which are slightly at variance with the rates shown in there.

XQ. 1088. Let me understand that; on Exhibit 17-F, you used revised equipment rental rates? A. The equipment rental rates were revised slightly from those that were used in 17-E. Those rates were prepared in the Denver office and submitted to the project office. The basis for the preparation of those was, to the best of my knowledge, Plaintiff's Exhibit 17-C; with allowances made for maintenance, fuel and lubricants.

XQ. 1089. Well, were the rates that you used in both Plaintiff's Exhibits 17-E and 17-F derived from this schedule which is Defendant's Exhibit 17-C? A. This is Plaintiff's Exhibit 17-C.

Mr. Ruddiman: Those exhibits just referred to in the last few questions should be Defendant's Exhibits 17-C, 17-E, and 17-F rather than Plaintiff's.

(Question number 1089 was read by the reporter.)

A. Yes, these rates were furnished by the Denver office to the project office but the basis of their computation is Plaintiff's Exhibit 17-C, to the best of my knowledge.

XQ. 1090. I will point out to you the rate for a twelve-yard Euclid tractor truck, appearing at page seventy of Plaintiff's Exhibit 17-E; the rate there shown is \$2.90 an hour. I will ask you whether that includes both the cost of ownership and maintenance and fuel?

Mr. Sweeney: I object, may your Honor please. May I suggest that these questions are premature in touching the rental rates. We have presented our proof in two parts; first, proof touching on the conditions, what he did; we are yet to present our proof on the second phase of the program touching rental rates.

Commissioner Evans: Off the record.

(Whereupon there was unrecorded discussion.)

Mr. Ruddiman: That question is withdrawn.  
1628

XQ. 1091. In a question by the defendant you stated that adjustment was proposed by the defendant under Change Order Number Three. It is true, is it not, that costs were computed on a basis



of excavation, haulage and separation from borrow pit number two and not just upon the cost of separation? A. The Contracting Officer proposed adjustment for compensation for work, "That although there is no order or instruction of the Contracting Officer to you directing that the operation in borrow pit number two be paid for on the actual cost plus ten percent, you have submitted your claim on that basis and adjustment on such basis is now found to be equitable." In other words, the basis of this proposal for adjustment for compensation as submitted to the Contracting Officer or by the Contracting Officer to the Contractor is based on the Contractor's statement of claim. However, the order for Change Number Three directs the Contractor to do the work and that an adjustment will be made after the Contractor submits his claim covering the additional work, not the entire work in the borrow pit.

XQ. 1092. Then it is true, is it not, the proposed adjustment does not apply merely to the cost of separation? A. That is a counter-proposal. The proposed adjustment covers the exact thing that the Contractor covered in his claim. I might add here that this exhibit that we have just been referring to, Exhibit 17-E, which I prepared and which sets up some cost data, covers only removal of plus-five-inch rocks from the material. It does not cover the

entire excavating and hauling operations in  
1629 the borrow pit.

XQ. 1093. Then your testimony about unit costs of approximately three and eight cents applies only to the operation of separation, is that correct? A. That is correct; that includes the three cents for the cost of labor and equipment in removing the plus-five-inch stones on the embankment, part of which cost at least is a contract obligation of the Contractor under placing embankment materials.

Mr. Ruddiman: I object to his interpretations.

Mr. Sweeney: I don't understand that Mr. Walton is attempting to interpret the contract. He is explaining under the contract what the method is of doing this work.

Commissioner Evans: As I understood it, you deducted something from six cents and it came out about five and a half cents, didn't you?

The Witness: No, sir; we didn't deduct anything. We show an average of six and a half for the entire operation in 1939 and 1940 for removing the plus-five-inch stones from the material that was placed in the embankment and it was excavated from borrow pit number two. I stated in there that under the provisions of the contract there is some rock removal required under placing of embankment for which the contractor is paid at five cents a yard under a different schedule item.

Commissioner Evans: Go ahead, what is the next question?

By Mr. Shields:

XQ. 1094. Mr. Walton, looking at Plaintiff's Exhibit 17-D, sheet 27—

1630 Mr. Sweeney: Pardon me, you mean Defendant's Exhibit.

By Mr. Shields:

XQ. 1094. (Continued) Defendant's Exhibit 17 and ask you what would you saw as to the character of materials in there being excavated? A. The materials being excavated in this pit, coming from the bucket, is a sandy, gravelly material. They are taking the second cut.

XQ. 1095. Note that the embankment against which the excavation is made appears to be almost horizontal; does sand and gravel customarily stand in that position? A. It did in this case. We have one in this report of mine standing fifty feet high, practically vertical.

XQ. 1096. Will sand stand practically vertical? A. I didn't say it was all sand. I said it was sandy gravelly material and it is the second cut and glacial material in the first cut.

XQ. 1097. I believe you said that these photographs, Defendant's Exhibit 17-D, and 28 sheets, were typical generally of conditions as encountered in barrow pit two? A. I said that the pictures taken were taken throughout the year and were typical of conditions as being encountered at that particular time. Some of those were taken in area

number one which the government concedes was a more cobbly portion of the pit. Some of them were taken in other portions. They are representative of the work that was being done at that time.

1631 XQ. 1098. What you call area number one of pit two contained, you contend, a lot more cobbles than were contained in other pits? A. I wouldn't say a lot more. I can give you the exact figures if you want them.

XQ. 1099. Contained more? A. Contained more.

XQ. 1100. Was there any area in pit two that didn't contain a considerable percentage of cobbles? A. Oh, a great deal of them.

XQ. 1101. So-called areas, I am talking about; not just picking out an isolated spot somewhere. A. I would say the entire second cut in area number one contained less than two percent cobbles.

XQ. 1102. Do you know whether or not it is more difficult to excavate where there are large cobbles than where they are not? A. What do you mean by large cobbles—what size?

XQ. 1103. Cobbles in excess of those permitted to be in, say, section two of the zone two of the embankment. A. There was a lot of this material that was put in Zone two embankment, upstream part, the glacial till came in there in this impervious material and there was a lot of that went in the upstream part of number two zone.

XQ. 1104. Did that or did it not have to be separated, cobbles removed the same as materials from



other sections of pit two? A. It had to have all the plus-five-inch stones removed from it, yes.

1632. XQ. 1105. Was there a yard of material coming from pit two and going into the embankment that didn't have to be separated either by means of the separating equipment provided by the Contractor or by this rake dozer that was an arrangement that was used on the embankment?

A. There was a lot of material that came out of the second cut of area number two that could have been placed without going through the separating plant and with a very nominal amount of rock removal on the embankment.

XQ. 1106. That doesn't answer my question. Read the question.

(The question was read.)

The Witness: Does that answer your question?

Commissioner Evans: No, he said it didn't answer his question.

A. Well, there was a considerable quantity of material that came from barrow pit number two that could have been placed with—

XQ. 1107. I am asking you if there was a yard that wasn't separated in one fashion or another. Now you can answer that in your own knowledge.

A. I have got to qualify separating. If you would call the material coming in from barrow pit number one the removal of plus—

XQ. 1108. Number two. A. I have got to qualify it.

Mr. Sweeney: May the witness please be permitted to explain his answer, if your Honor  
1633 please.

Commissioner Evans: Was there any material that came out of barrow pit number two that could have been placed without having the stones taken out of it?

The Witness: No, sir; not and meet with the specifications; that is, borrow pit number one.

By Mr. Shields:

XQ. 1109. Then in addition you mean to say there was no material coming out of two—I mean out of pit one that had to be— A. That had—

XQ. 1110. —had, likewise to be separated? A. I can say it this way: all material that came out of barrow pit number one that contained plus-five-inch stones had to have the plus-five-inch stones removed as they were placed in the embankment to meet the specifications.

XQ. 1111. Was any put through the separating plant to take the rocks out of it? A. Not to my knowledge.

XQ. 1112. Was any of it handled by rake dozers? A. I don't believe there was. I think there was a lot of material spread by the dozer that came out of barrow pit number one; in fact I know there was a lot of it.

XQ. 1113. You don't mean tho that the cobble content of materials coming from pit one would be the same in point of cobble content as materials coming from pit two?

Mr. Sweeney: We object to the form of the question. What are the facts, may your Honor please, not what do you think. A. The material coming from pit number one was an entirely different type of material from material coming from pit two with the exception of some of this second cut in area two which was comparable with lower regions of borrow pit number one. The material from borrow pit number one consisted mostly of silt and clay. Material in borrow pit number two consisted mostly of glacial till, sand and gravel.

XQ. 1114. Did I understand you, in explaining sheet twelve of Plaintiff's Exhibit 17-D—

Mr. Sweeney: Pardon me, if Your Honor please, may I ask my friend, Mr. Shields to describe correctly Defendant's Exhibit?

Mr. Shields: That's what I said.

Read the question please.

(The question was read.)

By Mr. Shields:

XQ. 1115. Did I understand you to say in describing sheet twelve of Defendant's Exhibit 17-D, that the materials being handled there by the bulldozer were materials previously cast aside in a windrow and were not representative of materials as dumped on the embankment? A. No, sir; you didn't understand me to say that at all.

XQ. 1116. What did you say? A. The materials that are being moved with the scratch dozer are

materials that have been hauled in from barrow pit number two. The cobble in the background is a portion of the cobble filled section of the embankment and all this rock was either placed from the screening plant or by scratching out the plus-five-  
 1635 inch rock from materials as hauled in from the borrow pit.

XQ. 1117. In other words, that is rock cobbles that has been obtained by separation, one means or another, from the embankment—from excavation from pit two? A. No, sir; from required excavation for structures, embankment, spillway and cut-off trench and a good portion—I didn't say all of it was; some of it probably came from the borrow pit.

XQ. 1118. This is dated May 30, 1940; was any cut-off trench being excavated at that time? A. For the past two years. That rock you were looking at was placed in 1939.

XQ. 1119. And if the picture were long enough, this would show the cobble, in a similar situation, was all across the downstream embankment placed at that time? A. Where cobble fill had been placed? Yes, this is in the diversion channel. That is filling the enclosure, making the closure in the temporary diversion channel.

XQ. 1120. The cobbles shown would be the cobbles last extracted from the excavation, wouldn't they? A. Not necessarily; no, sir.

XQ. 1121. Wouldn't the cobbles first placed be on the bottom? They wouldn't be up toward the



top of it. A. As I explained herè in my testimony, the second diversion of the Pine River was made in the spring of 1940. We had a temporary diversion channel that was considerably below the 1636 average elevation of the embankment on the left side of the temporary diversion channel.

This photograph represents the embankment being placed in the number three zone in the temporary diversion channel. The embankment which is in evidence in the background and which is bordered by the cobble filled section of the embankment was placed the previous year. Does that answer it?

XQ 1122. It doesn't answer it but it gave you a chance to make a speech.

Mr. Sweeney: I object to facetious remarks by Plaintiff's Counsèl.

By Mr. Shields:

XQ. 1123. Referring to Defendant's Exhibit 17-D, sheet eleven, at the far left end of the embankment, in what appears to be a semi-circle, appears a section of cobbles, doesn't it? A. No, sir; it does not.

XQ. 1124. What is it? A. It is riprap that was hauled from the borrow pit seven miles upstream.

XQ. 1125. Showing the upstream side? A. Upstream slope of the embankment.

XQ. 1126. Would riprap be along the whole embankment as it is at that end? A. I think there was some riprap that was placed in the immediate foreground of the picture, not visible in the picture.

XQ. 1127. Mr. Walton, as a matter of fact, as it now stands, this Contractor was paid as for earth excavation only, 23c per cubic yard, for all 1637 materials removed from pit two, whatever you call it, earth-cobble pit, or what, isn't that true? A. That is right. The Contractor is paid under schedule item number 14, borrow pit excavation, at 23c per cubic yard.

XQ. 1128. In other words, the Reclamation Bureau authorities took the position that because this pit was called earth pit, anything coming out of it would be paid for as earth.

Mr. Sweeney: May your Honor please, that is irrelevant and immaterial because the Contracting Officer has already made an equitable adjustment in this case based upon payment of the Plaintiff for excavating cobblestone.

Commissioner Evans: The objection is overruled.

Mr. Shields: Read the question, please.

(The question was read.)

A. The payment was made under earth embankment borrow excavation. Does that answer your question?

By Mr. Shields:

XQ. 1129. If that is your answer and you want to stand on it, let it go at that. A. That is the way it was paid.

XQ. 1130. And was ever a yard of cobble excavation made from the cobble pit shown on the contract drawings at the place where cobbles were to be

obtained for building the slope of cobble on the downstream side of the dam? A. As I previously explained, ~~there were~~ 5,000 yards of material excavated from the cobble borrow pit which was paid for under earth embankment borrow pit excavation because it was not excavated for cobbles but 1638 for earth.

XQ. 1131. In other words then, if you didn't pay for any cobbles out of the cobble pit and didn't pay for any cobbles out of the earth pit, did you pay for any cobbles out of any pit? A. Not just as things stand now. The Contracting Officer's finding of fact there sets out, I think, approximately \$45,000 which is considered an equitable adjustment for the Contractor by reason of the fact that the cobble borrow pit wasn't used and cobbles were secured from the earth embankment borrow pit number two. That was considered by the Contracting Officer as an equitable adjustment.

XQ. 1132. And that determination was made after all the work was completed and all the payments had been made, is that true, and not currently as the work was done? A. That's right; the payment, you mean, was made?

XQ. 1133. Yes. A. Payment has not been made yet.

XQ. 1134. It was tendered or offered. A. Payment was offered in the decision of the Contracting Officer; ~~there was~~ an attempt to reach an equitable adjustment with the Contracting Office and no basis

could be reached on which agreement could be entered into with the Contractor for this. That was the order for Change Number Two which was an attempt to do this.

XQ. 1135. And the contract provided a price of 35c for cobble and 23c for earth excavation, 1639 is that correct? A. Correct.

Mr. Shields: That is all.

#### Redirect Examination

By Mr. Sweeney:

RDQ. 1136. Mr. Walton, tell His Honor, please, where was the cobble fill to come from? A. The cobble fill was to be constructed of stones larger than two and a half inches in diameter coming from the required excavation for the dam; that is, the cut-off trench, the spillway, the outlet works, and the temporary diversion channel and from plus-five-inch stones removed from materials coming from borrow pit excavation and the deficiency of cobbles necessary to complete the embankment was to come from the cobble borrow pit.

RDQ. 1137. Do you recollect, please, what the estimated quantity was? That is, from the cobble pit? A. The amount shown in the specifications, estimated to come from borrow pit under item 16, was 50,000 cubic yards.

RDQ. 1138. Now do you recollect how much cobble was set up in the schedule of unit prices to be placed or moved? A. You mean was set up in order for Changes Number Two?



RDQ. 1139. No, cobbles; in the schedule? A. You mean cobbles?

RDQ. 1140. About how much? A. Well, it is under a number of different items. Item number 20, sixty thousand yards; item 21, 275,000 1640 yards.

RDQ. 1141. In other words, 350,000 cubic yards was set up in schedule— A. 355,000, to be exact.

RDQ. 1142. 355,000? A. Correct.

RDQ. 1143. And do you recollect that the final voucher indicated approximately 330,000 yards were placed? A. The final quantity paid for on the final voucher under item number 20 amounts to 19,300 yards and under item 21 it is 311,000 yards making a total of approximately 331,000 yards.

RDQ. 1144. Now, please, with respect to item 16, on the three thousand. What is the explanation of that as compared with the large quantity of 355,000? A. It was estimated at that time that it was only necessary to get a small quantity from the cobble borrow pit in order to complete the cobble section of the embankment.

RDQ. 1145. Was that for deficiency purposes? A. That was for any deficiency that might be after all other excavations were made. However, in the order for Changes Number Two that was proposed to the Contractor, it was set up in there that we would take 250,000 cubic yards from the pit which was approximately five times that set up under item 16.

RDQ. 1146. Now, please, you were questioned by Counsel regarding the basis for rental rates; reference was made to Plaintiff's Exhibit 17-C.

1641 Tell His Honor please, is that the Bureau of Reclamation equipment rental rate for 1940?

A. Plaintiff's Exhibit 17-C is equipment rental rate schedule dated January 2nd, 1940; put out by the Bureau of Reclamation by the Denver Office.

RDQ. 1147. With respect to Defendant's Exhibit E, you testified on cross examination that the calculations did not cover the entire cost of excavation and hauling. Will you explain to His Honor the reasons why it did not? A. The cost shown in there only covers the cost in removing the plus-five-inch stones because that was the only issue that was involved in this claim. Under the contract the Contractor had to make the excavation, haul the material to the embankment; that was not a point of issue. It was the removal of the stones that was the point of issue.

RDQ. 1148. Prior to 1940, Mr. Walton, and from the beginning of the job up until June 21, 1941, the separating plant was set up in borrow pit number two. You were asked, "Were any cobbles, plus-five-inch; put through the separating plant," you answered, "No." Will you tell His Honor why you said no? A. I answered "No material from borrow pit number one," I believe.

RDQ. 1149. The material in borrow pit number one contained only a small amount of plus-five-inch

stones and these were removed by the Contractor as the embankment was being placed, by 1642 hand picking and also by the dozer kicking them over into the cobble section of the embankment.

RDQ. 1150. With respect to the period prior to June 21st, 1940, was the separating plant adequate to handle five-plus cobbles? A. Prior to June 21st, 1940? No. As I explained in my testimony—You mean during 1940?

RDQ. 1151. No, prior to June 1940 when the plant was remodeled and set up June 21st, 1940, in pit two. A. The separating plant was used in the downstream side from the embankment during 1937, 1938 and 1939 in separating the material from the required structural excavation. The operation was not too satisfactory. I was told by Mr. Wunderlich shortly after—

Mr. Shields: I object to what he was told.

Mr. Sweeney: That is correct but this is redirect and—

Commissioner Evans: Objection overruled. He may answer.

Mr. Shields: Exception.

A: (Continuing) I was told by Mr. Wunderlich shortly after the plant arrived on the job it would handle approximately a thousand yards an hour. I think the maximum it ever handled was approximately four hundred yards per hour until it was set up in the borrow pit at which time the operation was more efficient.

RDQ. 1152. Will you tell His Honor why, please?

A. The screening plant was—the design of it was entirely changed; that is, the method of handling the material at the plant as it was set up in borrow pit number two, and it was more efficient. It would handle considerably more cobble more efficiently. It had a short length of horizontal conveyor belt, while over in the set up in 1938 and '39 it had a long inclined conveyor belt and it just couldn't get the material up to it fast enough.

Mr. Sweeney: That is all, if Your Honor please.

#### Recross Examination

By Mr. Shields:

RXQ. 1153. You referred to schedule items 20 and 21 as showing cobble fills of 80,000 cubic yards and the other cobble fill of 275,000 cubic yards. Bearing in mind the voids in this fill that you have previously described as existing, what amount of excavation would that quantity of fill represent?

A. Well, this 275,000 yards and this 80,000 yards are set up in item 21 and 20, schedule items, and represents cobble fill and cobble and gravel fill in place. That does have the voids in it.

RXQ. 1154. Allowing for those voids, what amount of pit excavation or other excavation would that represent as having been made to obtain that much cobble? A. That depends entirely on what percentages of cobble the material contained that was—I can't answer that.



RXQ. 1155. You can't answer the question? A. No.

RXQ. 1156. It would be vastly larger than the finished fill, whatever it is? A. Oh, yes; probably run up into millions of yards.

### Redirect Examination

By Mr. Sweeney:

RDQ. 1157. Tell His Honor please, in regard to the separation plant that was set up in borrow pit number two, was that on the basis of separating cobble plus-five instead of plus-two-and-a-half inches? A. The separation of the required structure excavation under the item set up in the specifications was required to be done at a separation over two and a half inch. In other words, the bars were spaced at two and a half inches in borrow pit number two. The Contractor was advised that we wanted all stones smaller than five inches in with the fine materials and stones larger than five inches to go into the cobble filled section of the embankment. The bars were spaced at about four inches in the clear which gave an equivalent to a five-inch square opening in order to meet the provisions of the specifications.

Mr. Sweeney: That is all.

Mr. Shields: That is all.

Commissioner Evans: We will take a short recess.

(Whereupon a short recess was taken.)

✓ Commissioner Evans: The hearing will be in order.

Mr. Sweeney: At this stage of the proceedings we are temporarily withdrawing Mr. Walton from the stand in order to present certain witnesses through whom we will offer certain exhibits 1645 for comparative purposes. That is, they will be needed by Mr. Walton in making his comparative analysis of equipment rental rates that were computed by the Bureau and rates claimed by the Plaintiff and then we'll present proof as to the actual cost incurred by the Plaintiff in similar contracts with similar equipment at about the same time, that is between '41 and '43, to establish that the allowance made by the Bureau are actually more than the Plaintiff's actual operating costs on similar work, using similar equipment.

Mr. Davis, take the stand, please.

**Bruce G. Davis**, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

Direct Examination on Claim No. 17

By Mr. Sweeney:

Q. 1. For the record, Mr. Davis, state your full name. A. My name is Bruce G. Davis.

Q. 2. Your residence? A. 798 Niagara Street, Denver.

Q. 3. You are, at the present time, employed in the office of the Chief Engineer, Bureau of Reclamation, Denver? A. Yes, I am.

Q. 4. Tell us what your duties are. A. I am in a section which records contract progress and obtains unit construction costs on contract jobs.

1646 Q. 5. About how long have you been employed by the Bureau of Reclamation? A. On the present employment, approximately a year and three months, prior to this time I worked for them possibly six and a half years.

Q. 6. Prior to that time six and a half years, what were your duties, what projects? A. I was on the Boulder Dam Project construction 1933 through 1940. At this time I was with the Bureau of Reclamation.

Q. 7. That project was in charge of the Chief Engineer in Denver? A. Chief Engineer in Denver.

Q. 8. Tell His Honor please, in some detail, what practical experience you have had in matters of this kind. A. Bachelor of Science in civil engineering and experience in civil engineering primarily over construction, 1933 until the present. I have been on several construction jobs; Boulder Dam, Panama Canal job, I've worked for the Public Roads Administration and the Navy Department and then returned to the Bureau of Reclamation on this cost and progress job in Denver.

Q. 9. You have told His Honor you were in Panama. Were you employed by the Panama Canal? A. By the Panama Canal and office engineer on Gatun Third Locks Project.

Q. 10. Tell His Honor during what period? A. That was from approximately January of 1941 through November of 1943.

1647 Q. 11. And during that time, did you have anything to do in connection with the performance of your duties as having any relationship with Plaintiff? A. At that time Martin Wunderlich Construction Company and Oaks Construction Company ventures had the contract for the excavation of the Gatoon Third Locks. I was in contact with that job as office engineer of that job.

Q. 12. As to the character of equipment used by the Plaintiff in the Panama job, are you familiar with that and also with the character of equipment used at the Vallecito Dam job? A. I am not familiar with the Vallecito Dam job.

Q. 13. With the equipment used on it? A. The equipment used, I am not familiar; I can't testify as to that equipment. I am familiar with the earth moving equipment and the equipment used at the Panama job, it was standard equipment—D8 tractors and small Euclid trucks, twelve yards, and, I believe some sixteen yard Lima draglines—standard earth moving equipment.

Mr. Shields: Mr. Commissioner, I interpose an objection to any line of questioning about experience in Panama or anywhere else as it has no bearing whatever on this hearing.

Mr. Sweeney: If Your Honor please, I am laying the foundation for later development of certain



points in regard to equipment rental rates and the equitable adjustment made by the Chief Engineer in Denver via the Contracting Officer in this case.

These questions are, of course, wholly preliminary.

Commissioner Evans: The objection is overruled.

By Mr. Sweeney:

Q. 14. With respect, please, to the kinds of equipment that are used in ordinary earth moving or excavating jobs, is it substantially the same or is it different? A. Substantially the same on all earth moving jobs, in my experience.

Q. 15. With respect to the job in Panama, did you see the equipment as it came to the job and can you tell His Honor the condition of it when it arrived? A. Yes, I saw the equipment as it first arrived on the job.

Q. 16. Tell what you saw, please. A. The equipment that came in first was largely used equipment which was in good operating condition. It came directly from the boats to the project and went to work. At a later date new equipment was also added to the used equipment which the contractor had moved in.

Q. 17. Have you told his Honor, please, just what duties you performed in the office in Panama Canal in connection with the work that was at that time being performed by the Plaintiff in this case? A. As office engineer I was responsible for supervision of all computations of all jobs, pay estimates, and

for keeping of the costs on the contract and, on that particular job, we had a section which kept contractors' unit costs in connection with the work.

Q. 18. Now, with respect to the Plaintiff in this case, did you keep such records at that time? A. We kept equipment cost records for Martin Wunderlich Company, in connection with the excavation work they were performing.

Q. 19. I show you what has been marked Defendant's Exhibit 17-R for Identification. Tell his Honor what it is.

(The document above referred to, marked Defendant's Exhibit No. 17-R for Identification, is filed in connection with this case.)

A. This is a report entitled, "United States, The Panama Canal, The Third Locks Project, New Gatun Locks Excavation and Apurtenant Work Equipment Operating Data." This report was prepared from data which was gathered under my supervision and direction; and was assembled by a section under my supervision and direction; I have costs actually determined on the job, of operating the contractors' heavy equipment.

Mr. Sweeney: It is now offered, if Your Honor please, for comparative purposes for use by Mr. Walton in connection with analyses that he will make of rates as calculated by the Chief Engineer, the rates as claimed by the Plaintiff and we will show that the actual operating costs, if Your Honor please, of the Plaintiff in this case on the Panama

job were actually less than the maintenance allowances by the Chief Engineer in connection with his equitable adjustment.

Mr. Shields: I object to the use of this exhibit for any purpose. It relates to a later period, 1943, to another job, work in an entirely different climatic situation, work under engineers not comparable to the bullheadedness of Mr. Burns—

Mr. Sweeney: That is unjust and unfair.

Mr. Shields: And not evidential for any purpose in this case.

1650 Mr. Sweeney: Have you concluded, Mr. Shields?

May we point out, if Your Honor please, that the objection, as noted by my opponent, in this particular aspect, is not well founded; for as the war progressed, costs increased and therefore his cost would have been greater in 1943.

Commissioner Evans: I just want to get more in my mind about that. What sort of costs are in this report? Are the fuel costs?

The Witness: It is the fuel costs, to give you the background—

Commissioner Evans: Of the operating equipment?

The Witness: Operating equipment.

Commissioner Evans: Labor costs?

The Witness: Labor cost, repair parts, repair labor, fuels, lubricants, all items which made up the operating cost of equipment including depreciation.

By Mr. Sweeney:

Q. 20. Does the cost include the depreciation? A. Yes, sir.

Q. 21. All items of cost? A. Yes.

Mr. Shields: Just as well get some data about the operations in Japan or Timbuctoo or anywhere else.

Commissioner Evans: Let the record show that the objection is overruled. In permitting this evidence to go into the record, I should like to warn Counsel for the Government that it will carry, in my mind, very little weight unless you establish better foundation for the similarity. We don't know what the relative costs were in Colorado in 1939 and in Panama in 1943 of labor, parts, fuel, or anything else.

1651 Mr. Sweeney: That is what we propose to do through Mr. Walton.

(The document above referred to, previously marked Defendant's Exhibit No. 17-R, 23 pages, for Identification, is now received in evidence and filed in connection with this case.)

Mr. Shields: Was this a cost-plus job?

The Witness: No, sir; just unit price contract.

Mr. Shields: Was it any part of your duty to find out exactly how much money the contractor was spending on the job?

The Witness: In this particular contract that is in the specifications; we had an escalator clause which reimbursed the contractor for labor, mate-



rials and freight and we therefore kept complete records of all his costs in a section of approximately twenty men whose duty it was to collect the contractor's costs.

Mr. Shields: But where did that make it your duty or any part of your duty to find out how much he was spending for gas or oil or other equipment?

The Witness: In connection with the escalator clause we had to know how much he paid for it in order to reimburse him. However, this cost finding was separate from that in as much as the government, for their own purposes, determined—the wanted to keep complete costs of the job, find out what it was costing the contractor and maintain such records.

Mr. Shields: Where did you obtain the data about costs, from the contractor?

The Witness: No, we obtained from the contractor certain information; we obtained certified copies of payrolls, certified copies of all purchase vouchers, certified copies of all shipping vouchers, we maintained men in the field who checked the contractor's men for distribution of their time and maintained a man in the contractor's shop to check labor on equipment repair and got copies of the repair tickets made out by the contractor's foreman and we got our information from exactly the same source the contractor did.

Mr. Shields: Whether your information was correct would depend on whether the contractor's reports were correct.

The Witness: No, we counted the men, knew their hours, knew their rates as well as the contractor knew them, the force actually working on the job. The only records the contractor gave us were certified copies of documents such as payrolls.

Mr. Shields: You didn't get the cost of equipment from the contractor's records?

The Witness: That is the cost of new equipment?

Mr. Shields: Yes.

The Witness: I don't know for sure. When the contractor purchased new equipment we took book value on it.

Mr. Shields: You didn't get the cost per hour of operating a given piece of equipment from the contractor's records?

The Witness: No, we determined that independently.

Mr. Shields: And whether or not you determined it correctly would depend on how complete your information was?

The Witness: That is true.

Mr. Shields: What would you say, do you know, as to whether depreciation in the Panama climate would be comparable to the depreciation of similar equipment in high altitudes such as the Colorado Rockies?

The Witness: Without more information, I wouldn't be qualified to say. The wear and tear on it would depend on the type of—

Mr. Shields: You wouldn't figure the depreciation would be the same?

The Witness: Not necessarily the same, no, sir.

Mr. Shields: Depend on wear and tear as well as the climate on the various equipment used?

The Witness: That's right.

Mr. Shields: I notice you have one sheet, number twelve, of Defendant's Exhibit 17-R which purports to list in one column the name of the different types of equipment and in the second the number of such items; third, repair labor; fourth, repair parts; fifth the depreciation and then the total of those three items and then in the final column "Credit, Rentals," and under the later column the amount of the rentals seems to equal the total of the amounts charged off for repair, labor, parts and depreciation, is that correct?

The Witness: That appears to be correct, yes.

Mr. Shields: So that if the contractor spends so much for labor and so much for repairs and so much for depreciation, and rents the equipment for the total of the sum so spent he wouldn't be getting anything for the use of the machine, would he?

The Witness: If he rents it for this figure?

1654 Mr. Shields: Yes.

The Witness: No, sir. I submit there that you are taking only one account and there are three accounts; plant account, which is the original value of the plant plus any major improvements in the plant; the plant rental account which is the rental figure, which you have; and the plant operation account, which is the fuel and other operating costs.

Mr. Shields: What would you say probably makes up plant rental on equipment of this character?

The Witness: I would have to ask you to define "plant rental." It means a lot of things. If it means the same as "equipment ownership expense", "A.G.C." schedule, plant rental is an extremely loose term.

Mr. Shields: Well, you have used the term yourself here on sheet twelve which I previously invited attention to. What is the meaning as there used? The term "plant rental?"

The Witness: This was a plant rental account to which was charged repair labor, repair parts, depreciation—this depreciation was cleared from the plant account which was the original cost of the plant plus transportation plus impedimenta in turn, plus the plant rental cleared to plant operating account which included other costs of operation (fuels, lubricants, and so forth) that was cleared directly, and pay items. Plant rental here included hours of repair labor or parts and depreciation.

Mr. Shields: Nothing for the actual use or operation?

The Witness: Nothing as there set up.

1655 Mr. Shields: Mr. Wunderlich did a good job at Panama?

The Witness: He did an excellent job.

By Mr. Sweeney:

Q. 22. You were questioned regarding the cost of the contractor's equipment in this report. Tell



His Honor please, if the report itself shows the manner in which the cost of the equipment was determined? A. On page nine of Exhibit—Defendant's Exhibit 17-R, the method of computation of plant rental rates is set up in item four of this paragraph which states, "The original cost shall be the actual cost of the plant to the contractor, if no cost to the contractor, the item shall contain an appraised value plus cost of examining."

Q. 23. That is based upon an understanding or agreement between the parties? A. My recollection is that in almost every case we received information from the contractor as to the original cost of the plant or the cost which they set up in the partnership.

Q. 24. Tell His Honor please, if the Plaintiff's superintendent on that job, whom I believe was Mr. Stewart, the same man who supervised the performance of the Vallecito Dam, did he have any conversation as to whether or not the costs involved here were right or wrong? A. We directly discussed these costs and Mr. Stewart, at the end of the month, we gave him a copy of the report and my recollection is that Mr. Stewart never disagreed with the cost and in fact, in general, thought they reflected the actual cost of the work.

1656 Q. 25. Now, please, you were questioned regarding the manner of depreciation. Something was said regarding conditions in Panama, at a very low level and close to the sea as compared

to the work in high elevations, such as Vallecito. Now tell His Honor please, did you follow the straight line method of depreciation or some other system? A. We followed a straight line method of depreciation.

Mr. Sweeney: That is all, Your Honor.

Mr. Shields: That is all.

Commissioner Evans: Did I understand you to testify that in taking the capital cost of the equipment, you used a book value or what did you use?

The Witness: In general, on cases of new equipment, we received copies of the bills paid to the company on equipment to which we added freight and kept copies of all freight bills and set them up as cost to the contractor.

Commissioner Evans: Did that cost to the contractor represent capital outlay?

The Witness: Yes, sir.

Commissioner Evans: As to used equipment?

The Witness: As to used equipment, we were sometimes able to get—I believe in general we were able to get data as to the value, and the company and the parties agreed on it and if this appeared reasonable, we accepted it, if no figure was available on equipment on the job we set up an appraisal and we worked from that basis.

1657 Commissioner Evans: You had no reference, then, in particular to the value at which the equipment was carried on the books of the owner?

The Witness: Except in case of new equipment our value would be the same as his.

Commissioner Evans: Used equipment?

The Witness: Used equipment, not necessarily, unless they had a reasonable figure they established between themselves and we accepted it.

Commissioner Evans: Very well. Any questions? (No response.) That is all.

(The document above referred to, marked Defendant's Exhibit No. 17-R, is filed in connection with this case.)

1658 **Russell See**, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

Direct Examination on Claim No. 17

By Mr. Sweeney:

Q. 1. For the record, Mr. See, please state your full name. A. Russell See.

Q. 2. Your address please, Mr. See. A. 3004 Ash Street, Denver, Colorado.

Q. 3. And you are employed in the office of the Chief Engineer? A. Yes, sir.

Q. 4. Bureau of Reclamation, Denver? A. That's right.

Q. 5. And you have been there for how many years? A. About thirty years with the Bureau of Reclamation.

Q. 6. Tell His Honor, please, what your present duties are. A. Head of the division of General Engineering that takes care of contract matters and issues—takes care of contract matters and other matters connected with general engineering.

Q. 7. During the period that this contract was performed please, 1938 to 1941, what were your duties in the office at that time? A. I was in charge of the contract adjustment section of the Chief Engineer's office.

Q. 8. And did that work relate to matters concerning claims for additional compensation 1659 by the contractor in this case? A. Yes, sir.

Q. 9. Now there has been offered in evidence Plaintiff's Exhibit 17-C, the 1940 Bureau Rental Rates. Defendant's Exhibit 17-C; did you have something to do, please, with the preparation of these rates or do you use them in connection with matters coming before your office involving claims? A. Yes, these rental rates were prepared under my direction, within my section in the Bureau.

Q. 10. Now, in regard to them, please tell His Honor in just what way were they prepared? That is, what do they reflect? What is their purpose? A. Well, these were based on the Associated General Contractor's Report of 1936 and they were intended to set up a working schedule of working rates for equipment which the government rented from contractors for use on cost-plus jobs.



Q. 11. Will you explain, please, the so-called "A.G.C." formula for rental rates? How are such rates determined? A. Well, the A.G.C. formula was set up to cover the ownership expense for contractors on equipment. It covered depreciation, the cost of major repairs, the cost of interest, insurance and taxes. I mentioned depreciation—it was also included.

Q. 12. In other words, please, in preparing the Bureau schedule you used, as stated; as the basis thereof, the Associated General Contractors of America, Incorporated, ownership expense as Plaintiff's Exhibit 17-B? A. Yes, sir; that is correct. This is the 1937 edition. That is what 1660 we used as a basis.

Q. 13. We note that the Bureau schedule contains some modifications or additions to the factors that are set up in the A.G.C. rates with respect to the determination of monthly shift rates on an hourly basis. Will you explain that to His Honor please? A. We set up, in addition to our monthly rate, an hourly rate and also an additional hourly rate that is intended to cover the use of equipment for short periods where it is moved in for a matter of a few hours or just a few days and that rate was two and a half times the hourly rate under the monthly schedule set up.

Q. 14. Now you are only testifying, Mr. See, please, to matters involving the general application of these rates; another witness will explain the detail computations.

Now, with respect to the claim in this suit, and particularly claim 17, are you familiar with the method of procedure that is followed in calculating those rates? A. Yes, I was.

Q. 15. Tell His Honor what that was. A. The rate followed there; the method followed there was to use monthly rates rather—I would say it was turned in on an hourly base rate and we applied the shift rate shown in the schedule, which is one-thirtieth of the monthly rate, to the day shift. The night shift was on a two-shift basis, we applied the extra shift rate shown here.

Q. 16. What were you following, some standard formula? A. That is the A.G.C. formula, 1661 that extra rate does not have to cover the depreciation and taxes and insurance. They are carried in the daily rate. So the extra shift rate covers only the matters of the depreciation—additional depreciation and items that would be involved, but insurance and taxes would all be covered in the daily rate so the extra shift rate was figured as called for in the A.G.C. schedule as one-half the daily rate.

Q. 17. Now, please, we note that the Bureau has been making some additional allowances for lubricants, fuel and maintenance. Now, will you explain that to His Honor; as to what that is based upon? A. That is based on the Bureau's experience up to that date of the consideration of this claim and also to the information we got from State Highway

schedules, the Forestry Service and, I believe, two or three other sources of information. I think the University of Nebraska gave us some costs on lubricants and different types of fuels and lubricants in some of their experimentations.

Q. 18. Did you mention, please, some investigations by the Colorado Highway Department? A. Yes, the Colorado Highway Department in connection with their work in similar localities had a lot of data on costs of operating equipment.

Q. 19. We note, please, that the Contracting Officer in the determination of his equitable adjustment has calculated his allowances particularly for the separation plant, using a six-year life 1662 basis. Will you explain to His Honor why that was done? A. Well, we had some items of similar equipment in here and, I believe, I can't tell you the exact items, but we took the useful life as given in this schedule and based the rate we allowed for that plant upon the rate shown in this schedule.

Q. 20. Now, please, Mr. See, you have been in the Bureau of Reclamation for a great many years, you are familiar with the respective duties of the Contracting Officer and many construction engineers; they operate under his supervision. With respect, please, to the duties of a construction engineer on a job similar to the one in this suit, what authority, if any, does such a construction engineer have with respect to negotiating with the contractor

for payment of additional amounts of compensation for work under the contract?

Mr. Shields: I object to that as outside the scope of this hearing.

Commissioner Evans: Objection is sustained.

By Mr. Sweeney:

Q. 21. Mr. See, please, the plaintiff has offered in evidence a document which purports to be a memorandum of rental rates that he says was entered into between the Contracting Officer and himself. With respect to such an alleged agreement, has the Construction Engineer on the job any authority to make such an agreement on the job? A. No, sir.

Mr. Shields: It is certainly for the Court to determine what the authority of the Construction Engineer is as representative of the government, not his witness.

Q. 22. As a matter of practice, generally? A. No, sir.

Commissioner Evans: Off the record.

(Whereupon there was unrecorded discussion.)

Commissioner Evans: Let the record show that, following a discussion off the record, it has been agreed by government Counsel to change the form of the question to elicit the practice in the office.

Q. 23. (By Mr. Sweeney) Tell His Honor, please, what is the practice of the Bureau offices regarding, say, the rental rates that are claimed by the Contractor for additional work on a job of this kind?

A. Well, any rates which were agreed to in the field



would have to be what we call "a tentative agreement;" that is, conditional agreement subject to the Chief Engineer's approval. The Chief Engineer is the Contracting Officer. That has always been our practice on all our jobs.

Q. 24. Just what does the Construction Engineer on the job do, say, regarding claims submitted to him by a contractor? Such as in this case? A. Well, ordinarily he will transmit copies of those to the Chief Engineer, Contracting Officer, for further instructions on how to proceed with the handling of the claim.

Q. 25. Does he, in submitting that, make some recommendations? A. Frequently he does and sometimes he does not.

Q. 26. And if it involved a claim for additional work, what would he have to guide him in submitting his recommendation on additional cost, assuming he has experience as an engineer? A. He would have to have a good many years experience.

Q. 27. What fixed rental rates would he have to guide him? A. All our engineers have a copy of this rental rate.

Commissioner Evans: Before leaving that particular topic, in the practice of construction engineers in the field, has it been the practice, in your observation, for a construction engineer to, from time to time, recommend rates which are departures from the established schedule of your office as being his suggestions for equitable adjustments?

The Witness: No, sir; I don't think so.

Commissioner Evans: It has not been? Very well.

Cross Examination

By Mr. Ruddiman:

Q. 28. I didn't understand just how you computed the hourly rates used in claim 17 in this case.

A. The hourly rates went back from the monthly rates. The monthly rate is set out for thirty days, eight hours; that would be 240 hours, so we took one two-hundred-fortieth of the monthly rate as the hourly rate for the day shift.

Q. 29. And you used half that rate for the second shift? A. Yes, sir.

Q. 30. And you applied those rates to the actual hours of operation of the equipment, that is true?

A. Yes.

1665 Q. 31. Does the Bureau ever use its monthly rates? A. Yes, we do where we rent equipment for a period of months.

Q. 32. I take it that when the monthly rate is used, the contractor is paid for every day of the month, no matter whether it is Sunday or the equipment is not being used for rain or some other reason, is that true? A. That is true.

Commissioner Evans: Did you understand it?

The Witness: I believe I understood it.

Mr. Sweeney: Read the question to the witness, please.

(The question was read.)

By Mr. Ruddiman:

— Q. 33. In other words, he is paid in full monthly rates? A. That is right.

Q. 34. Suppose a contractor was working over a period of eight months. Would that monthly rate be multiplied by eight to get the total due for that eight-month period? A. If the equipment was being used continuously on that job it would be, yes. Continued use of equipment for eight months.

Q. 35. By "continued use" do you mean eight hours every day of those eight months? A. Yes, except when the weather is bad or something—a legitimate stoppage.

Q. 36. Stoppage for repairs? A. Not for major repairs.

1666 Q. 37. How about field repairs? A. Yes, we allow for field repairs.

Q. 38. How about Sundays? A. Well, Sundays—as I understood on this job this was a seven-day operation.

Q. 39. Well, if you were on a six-day operation?

Mr. Sweeney: If your Honor please, that is irrelevant and immaterial. That is a seven-day job.

Mr. Ruddiman: I am testing this man's qualifications as an expert.

The Witness: In a six-day operation we ordinarily pay the monthly rate.

By Mr. Ruddiman:

Q. 40. No deductions for not working on Sundays, is that correct? A. (The witness nods head affirmatively.)

Q. 41. Where did the Bureau get its figures for maintenance and repairs of equipment, the hourly rate to be used? A. From various sources; from our experience on government force work and from the State of Colorado in their highway operations, Forestry Service in Construction Operations and I believe from some other miscellaneous sources, I can't give you the details.

Q. 42. None of that is from contractors' usage of equipment, is it? A. Yes, sir.

1667. Q. 43. It is? A. Most of it is; the State Highway Department of Colorado is practically all from contractors' equipment.

Q. 44. Do you know whether the State of Colorado knows what the contractors' expenses are? A. No, I don't.

Q. 45. What would you say is a fair maintenance rate for a Caterpillar tractor? A. What do you mean, rate per hour?

Q. 46. Rate per hour. A. Off hand—we have the figures, we can look them up by reference.

Mr. Sweeney: To aid the witness, Your Honor, please, we are showing him schedule of equipment rates and operation allowances to be offered into evidence by Mr. Walton; to aid the witness in answering the question.



(The witness refers to a document.)

o The Witness: You want me to answer that question?

Q. 47. Will you answer the question? A. Repeat the question please.

(The question was read.) o

A. We have RD8 tractors—caterpillar tractors; the maintenance hourly rate is 24c determined by the Bureau.

Q. 48. Would you say that the hourly rate on a caterpillar tractor would be about the same as on a Lima dragline, model 901, two and a quarter cubic yard? A. I am not able to say whether it would be or not.

1668 Q. 49. You don't know whether they would be comparable in rate or not? A. No, sir; however, we give a rate here of 30c an hour in this tabulation for a 901 drag line three and a half cubic yard—it is given here as 30c an hour as compared to 24c for an RD8.

Q. 50. Approximately what would a Lima dragline cost new? A. The capital value given here is \$39,000.

Q. 51. You can maintain that on 30c an hour? A. That is what our figures show.

Q. 52. And approximately what does an RD8 Caterpillar tractor cost new?

Mr. Sweeney: We object, may Your Honor please, to this line of questioning on the ground that it is entirely outside the scope of direct exami-

nation. These calculations will be presented by Mr. Walton. The present witness was called to testify as to what is the standard or general practice.

Commissioner Evans: Objection overruled.

(The question was read.)

A. The valuation begins here at \$7,900—\$7,905.

Q. 53. And you say the hourly rate for maintenance of that should be 24c? A. Yes, sir; that is what our tabulation shows.

Q. 54. In other words, do you think it is reasonable that the rate for maintaining a Caterpillar tractor should be only slightly less than that for a Lima dragline? A. I think it is entirely possible.

Q. 55. Do you think it is reasonable? A. 1669 Yes, sir.

Mr. Ruddiman: That is all.

Redirect Examination on CLAIM No. 17

By Mr. Sweeney:

Q. 56. Tell His Honor, please, what is the practice of the Bureau of Reclamation when setting up rental rates for use in cost-plus work orders. A. Well, it is similar to what we followed in this case. We take the equipment rental rates from our schedules with the type of equipment used and use the same procedure we have in this case.

Mr. Sweeney: That is all on redirect examination, if Your Honor please.

I have some certified papers to offer while Mr. See is on the stand.

I now offer Defendant's Exhibits 17-s through 17-V.

They are copies of letters dated August 31, 1940, from the Contracting Officer to the Commission, submitting three copies of the proposed Form Three, Order B, approved by the Secretary of the Interior.

17-S one to three inclusive.

17-U, pages one to four inclusive.

17-T, pages one to three inclusive.

17-V, pages one to three inclusive.

Mr. Shields: No objection.

Commissioner Evans: They are so received. 1670

Mr. Sweeney: Defendant's Exhibit 17-T, pages one to three, is the approved order of changes by the Secretary of the Interior.

Mr. Shields: No objection.

Commissioner Evans: So received.

(The document above referred to, marked Defendant's Exhibit No. 17-S, is filed in connection with this case.)

(The document above referred to, marked Defendant's Exhibit No. 17-T, is filed in connection with this case.)

Mr. Sweeney: Defendant's Exhibit 17-U, if Your Honor please, is a document consisting of four pages. This is a communication from the Office of the Solicitor and is to the Commissioner and is

asking for certain information regarding the manner in which the equitable adjustment was calculated.

Mr. Shields: Defendant's Exhibit 17-U one, we object as being irrelevant to any issues being a letter written long after this whole transaction.

Mr. Sweeney: For your information, Your Honor, this letter was before the Secretary of the Interior who made his administrative findings. He is asking for certain information as to how certain rental allowances were arrived at.

The date of the Administrative Findings is July 7th.

I am offering this to explain just how these items were calculated.

Commissioner Evans: Objection overruled; document is received.

1671 (The document above referred to, marked Defendant's Exhibit No. 17-U, is filed in connection with this case.)

Mr. Sweeney: We next offer, if Your Honor please, Defendant's Exhibit 17-V, which is a letter dated May 5, 1943, from the Chief Engineer, S. O. Harper, to the Commissioner and it is in response to the previous request for information.

Mr. Shields: The same objection.

Commissioner Evans: Objection overruled.

Mr. Shields: Exception.



(The document above referred to, marked Defendant's Exhibit No. 17-V, is filed in connection with this case.)

Commissioner Evans: At this time we will adjourn until 9:30 in the morning.

(Whereupon, an adjournment was taken until 9:30 o'clock, a. m., Tuesday, November 19, 1946.)

(The parties met, pursuant to adjournment, at 9:30 o'clock, a. m., on the 19th day of November, 1946, in the Court Room of the United States Court of Appeals, Post Office Building, Denver, Colorado. Appearances were as previously noted. Mr. Harold E. Hastings, a certified shorthand-reporter, previously duly sworn by the Commissioner, was present.)

And thereupon, the following proceedings were had:

**Myron Nixon**, a witness produced on behalf of the defendant, having first been duly sworn by the Commissioner, was examined, and in answer to interrogatories, testified as follows: .

Direct Examination on CLAIM No. 17

By Mr. Sweeney:

Q. 1. Mr. Nixon, please, for the record, state your full name. A. Myron Nixon.

Q. 2. Address? A. Wheat Ridge, Colorado.

Q. 3. You are employed by the defendant and perform your duties in the office of the Chief Engineer, Bureau of Reclamation, Denver? A. That is right.

Q. 4. Tell His Honor, please, what duties you perform—the nature of them? A. My duties consist of helping get out extra work orders and changes under contract adjustment, supply contracts and construction contracts.

1673 Q. 5. And how long, please, have you been performing duties such as that? A. About eight years now.

Q. 6. Now just indicate to His Honor briefly your educational background, training and experience; your qualifications to do this work. A. B.S. degree in mechanical engineering, 1930, from the University of Colorado. I worked for the Aluminum Company of America one year and, following that, periods of employment with the Great Western Sugar Company, Holly Sugar Company, Bureau of Public Roads and the Reclamation Bureau.

Q. 7. Now please tell His Honor, did you have something to do in connection with claims that were presented by the Plaintiff in this case? A. Well, oh,—

Q. 8. Just tell what you did in connection with the claims which Plaintiff presented in this case. A. My work consisted of helping to establish these rental rates for Plaintiff's claim in borrow pit number two.

Q. 9. And in connection with that please tell His Honor what the usual practice is in the Bureau with respect to doing that; what standard do you have, to do that? A. The usual practice is following our own equipment rental schedule which is based on the contractor's ownership expense published by Associated General Contractors.

1674 Q. 10. And those documents are in evidence, please, as Plaintiff's Exhibits 17-C and 17-B? A. Yes.

Mr. Sweeney: We will mark these for identification.

(The document above referred to, marked Defendant's Exhibit No. 17-W for identification, is filed in connection with this case.)

(The document above referred to, marked Defendant's Exhibit No. 17-X for identification, is filed in connection with this case.)

(The document above referred to, marked Defendant's Exhibit No. 17-Y for identification, is filed in connection with this case.)

By Mr. Sweeney:

Q. 11. I show you a document marked Defendant's Exhibit No. 17-W, pages one to eight inclusive. Tell His Honor please what it is? A. This is a transmittal letter from the Chief Engineer to the Contractor enclosing tabulation showing detailed basis of determination of equipment rental rates

in connection with order for Changes Number Three.

Q. 12. Refer to the initials in the upper right hand corner, please, "MEN"—A. "MEN"?

Q. 13. Tell His Honor, did you dictate this letter?  
A. Yes, I dictated this letter.

Q. 14. And with respect to the data, did you prepare that? A. Yes, sir.

Mr. Sweeney: It is now offered, if your Honor please, to illustrate the testimony to be given 1675 by the witness.

Mr. Ruddiman: No objection, except that I believe this letter is already in evidence.

Commissioner Evans: It is so received.

(The documents above referred to, previously marked Defendant's Exhibit No. 17-W for Identification, is now received in evidence and is filed in connection with this case.)

By Mr. Sweeney:

Q. 15. I show you a document, please, marked Defendant's Exhibit 17-X, pages one to seven inclusive. Tell His Honor what it is. A. This is a letter from the Construction Engineer to the Chief Engineer, Denver office, showing or enclosing the project draft of adjustment compensation and order for Change Number Three. It contains allowances proposed by the Chief Engineer and these—there have been some corrections; there are three sets of figures contained here, typed, one penciled black figures and penciled red figures.



Q. 16. Explain them to his Honor, please. A. The typed figures are those which were made up on the project. They are proposed allowances and the penciled corrections in here in black pencil are corrections made by this office to agree with changes made in the method of computing capital values of the screening plant and a few other corrections. We found these on—

Q. 17. You are referring, please, to page seven?  
A. Yes.

1676 Q. 18. Of the document? A. Corrections are shown on page three but page seven shows the tabulation of all the equipment rental rates and allowances.

Q. 19. Now, referring to page seven, please, have you explained to His Honor what those penciled figures are and who made them? A. I made these black penciled figures. The red pencil and ink figures, however, are those made to agree with the final cross section taken on the project.

Q. 20. Will you note the initials "JRW" in the upper right hand corner of this? Who prepared that? A. It was prepared by Mr. Walton.

Mr. Sweeney: The document is now offered, if Your Honor please.

• Cross Examination on CLAIM No. 17

By Mr. Ruddiman:

Q. 21. Do I understand you to say that the type-written figures were the figures received from the field office? A. Yes, that is correct.

Q. 22. And the penciled figures, who prepared those? A. Those penciled figures are my corrections after it was received in this office.

Q. 23. And the figures in red, who prepared those? A. Those are figures placed on there by Mr. Walton, in the project office, to agree with the final cross section. They were final figures, I understand. Those were used in the final adjustment of 1677 compensation.

Q. 24. And in connection with the allowances for the use of equipment, were both the typewritten figures and the penciled figures based upon the Bureau's schedule of equipment rental rates?

A. Yes, everything, as I understand it, was based on our equipment rental schedule.

Mr. Ruddiman: I am going to object to this as an intra-departmental communication which was never communicated to the Plaintiff.

Commissioner Evans: Objection overruled. The document is received subject to identification by Mr. Walton as to the figures stated to have been made by him.

Mr. Ruddiman: Exception.

Commissioner Evans: Note the exception.

(The document above referred to, previously marked Defendant's Exhibit No. 17-X for Identification, is now received in evidence and filed in connection with this case.)

# Redirect Examination on Claim No. 17

RDQ. 25. I now show you a document marked Defendant's Exhibit 17-Y, pages one to seven. Tell His Honor what it is. A. This is a transmittal of letter from Chief Engineer to the Contractor enclosing the adjustment of compensation finally issued.

Mr. Sweeney: It is now offered.

Mr. Ruddiman: No objection except that it has already been introduced.

1678 Commissioner Evans: So received.

(The document above referred to, previously marked Defendant's Exhibit No. 17-Y for Identification, is now received in evidence and filed in connection with this case.)

By Mr. Sweeney:

RDQ. 26. Refer, please, to Defendant's Exhibit 17-W, pages one to eight, and explain in detail how you calculated the equipment rental rates set forth therein. A. Well, in general, the procedure was to follow the equipment rental rates set out in our schedule for the bare rental of the equipment, as much as this job operated on a two-shift basis—that is, sixteen hours a day, thirty days a month. We took the two shifts as a first shift rental plus the second shift, which is one-half of the first shift rental, and divided that by sixteen to get the comparable hourly basis. That is on a shift rate; I multiplied that by that and got an hourly rental

rate. To that we added rates for fuel and lubricants and maintenance and repairs.

RDQ. 27. Refer, please, to page one and, I believe, the first item, which is caterpillar tractors. Will you explain in detail to His Honor the calculations set forth under the various columns and tell him what they mean; what they reflect? A. Well, in figuring the total rate for caterpillar tractors, model RD8, 95 horsepower, we took, in this case as in every other case, I believe, the new capital values. That is, we figured new equipment 1679 laid down in Salt Lake City.

Commissioner Evans: New equipment what?

The Witness: Laid down in Salt Lake City.

Commissioner Evans: Why Salt Lake City?

The Witness: We fixed that as the one point in the United States where freight rates would be the highest, giving the Contractor the benefit of the highest freight charges we could.

Commissioner Evans: All right.

A. (Continuing) On the first shift rate, at that time, we took the freight rate of \$15.40 per shift.

Commissioner Evans: You spoke of a bear rental as a basis. What does that mean?

The Witness: Rental for the equipment alone without any operating cost included.

Commissioner Evans: That is based on values of the equipment?

The Witness: Capital values, yes, sir.



Commissioner Evans: Proceed.

A. (Continuing) The second shift rental, according to the equipment rental schedule of the Associated General Contractors', is one-half of the first shift rental; so that is the next figure. The total rental for two shifts is \$23.10 for two shifts.

The next figure is maintenance. That figure is an average figure that we have found, through experience on government force account work and work performed by other government agencies—1680 Forest Service, Bureau of Public Roads, and from State Highway Departments—to be reasonable for that type of equipment and that type of work; took that as five percent of the hourly rate.

The fuel and lubricants we drew there again on our experience with similar equipment on similar jobs. That covered fuel, lubricants, grease. That brought the total rental, operation, two-shift basis, to \$34.94. That figure, we reduced to an hourly basis by dividing by sixteen—that is, two shifts—which brought it down to a comparable figure of \$2.18 per hour.

Commissioner Evans: Restate the elements in that rate valuation. Your allowances there are for depreciation, is that right?

The Witness: The allowance there is for depreciation, taxes, insurance, major repairs, storage, all those factors enter into it.

Commissioner Evans: The all go into the bear rental. What is the other element?

The Witness: Other elements are maintenance and repairs.

Commissioner Evans: Maintenance? What does maintenance include?

The Witness: That includes minor repairs.

Commissioner Evans: Minor repairs?

The Witness: Anything necessary to keep the equipment operating.

Commissioner Evans: You referred to maintenance and repairs. What are the repairs?

1681 The Witness: That is really all one term.

Commissioner Evans: Two words to describe one term?

The Witness: That's right.

Commissioner Evans: All right.

A. (Continuing) We figure anything that keeps the equipment down for one shift is minor repairs and maintenance. Anything that keeps the equipment out of operation for more than one shift we consider that as major repairs.

By the Commissioner:

RDQ. 28. Major repairs go into bear rentals?

A. That's right; bear rentals.

RDQ. 29. Besides bear rentals and maintenance charges, what else? A. Operating charges, fuel, lubricants and grease—lubricating oil.

RDQ. 30. Fuel and lubricants? A. That's right.

RDQ. 31. Labor? A. Labor is not figured.

RDQ. 32. Labor is not included? A. No, sir.

Commissioner Evans: Go ahead.

By Mr. Sweeney:

RDQ. 33. Now, please turn to page three, the item "Lima Dragline". The same question, please.

A. On the Lima dragline, we took the capital valuation for a new two and a quarter Diesel machine from the equipment rental schedule; that is, 1682. as in the first case of the tractor, new cost of the machine laid down in Salt Lake City.

Commissioner Evans: What time?

The Witness: 1940.

A. (Continuing) On that machine, we made quite a new modification; took out the original engine—165 horsepower engine—and substituted a new Cummins Diesel, 250 horsepower engine. We took the capital value of that engine from our local dealer here in Denver. We added to that the cost of a three and a half cubic yard bucket. That left us a capital valuation for the remodeled 901 Lima dragline \$39,189. Now, to that capital valuation, we applied the ownership rate from the equipment rental schedule and got the bear equipment rental—that is, \$2,037.83 per month.

RDQ. 34. What was it you applied to obtain that two thousand dollar figure? A. Ownership rate in the equipment rental schedule.

RDQ. 35. What is the ownership rate? A. That is the percentage rate that is derived from the combination of depreciation, taxes, insurance, storage, minor repairs. In the maintenance of that machine we allowed a figure that we thought would be com-

parable to the D8 tractor. We figured that machine would be used probably a little harder than a D8 tractor and we gave them a figure of 36c per hour for maintenance. That totaled \$4.80 for sixteen hours.

Fuel and lubricants we did the same as on the caterpillar tractor, which is the result of experience arrived at on other projects, on government 1683 force jobs.

By the Commissioner:

RDQ. 36. On the basis of 250 horsepower Diesel engines? A. That's right; yes, sir. That brings the rental rate down to \$128.99 for the sixteen hours or an average of \$8.07 per hour.

By Mr. Sweeney:

RDQ. 37. Now refer, please, to page six, the item "Screening Plant" the same question. A. The screening plant is made up of a number of items of equipment—separation plant, we took the contractor's figures at \$20,000 as the valuation of the separation plant and making that plant, accommodating it for use on the job there was a charge for moving and erecting and remodeling which we included in this tabulation in capital valuation. Then there were three other—Waukeshaw Motor, International Motor and a Palmer Generator. The total of the valuation of those separate items was \$33,821.85. That capital valuation we applied to our equipment rental schedule rate, the ownership



rate on this item was shown to be 6.7% of the capital valuation per month. That figured out \$19.80 per hour bare rental for the first shift \$66.03 and the second shift rental, which would be half of that, would be \$33.02; and the maintenance would be \$5.60; lubrication would be \$2.24. The sums of those for the two shifts would \$106.89, or an hourly average of \$6.68.

1684 RDQ. 38. Tell His Honor, please, about the rates shown for the screening plant used in computing the additional compensation for order for Changes Number Three. A. You mean the rental rate?

RDQ. 39. Yes. A. Yes, it was.

RDQ. 40. Please explain that. A. By that, you mean the final rate that was in the adjustment of compensation?

RDQ. 41. Yes, tell His Honor, please, the facts. A. Based on the information from the project and corrections that we made in this office here at Denver, we took out from the capital valuation I have just stated the factors, moving and erecting and remodeling; we considered that to be a direct charge to the job and not as having any part in the capital valuation. That was removed and that, of course, altered the final rental rate on the screening plant as set up in the adjustment for compensation.

RDQ. 42. Now tell His Honor, please, with respect to each of the other items listed in tabulation of data that was communicated to the Plaintiff.

Did you follow the same procedure in calculations?

A. Yes, we followed the same procedure.

Mr. Sweeney: Take the witness.

1685

By Mr. Ruddiman:

RXQ. 43. Mr. Nixon, in computing these rental rates, did you apply the monthly rental rate for the full period that a piece of equipment was assigned to the work covered by Change Order Three? A. Used the time, the number of hours that were submitted by the Contractor. We took his hours as being correct because they jibed pretty closely with our time records on the job.

RXQ. 44. Those were hours of operation, were they not? A. I suppose they were, I don't know how they were arrived at; the figures were submitted by the Contractor.

RXQ. 45. Wouldn't it make a difference? A. How do you mean, it would make a difference? I don't understand.

RXQ. 45. Wouldn't it make a difference if the hours used in this claim were the hours of actual operation or the hours that the equipment was assigned to the work covered by Change Order Number Three? A. As I understand it, the times were the same. The hours you submitted was the hours the Contractor submitted, were the hours of operation consumed on the job, total hours.

RXQ. 46. Well, do you understand that the hours submitted covered sixteen hours a day for seven

days a week for the total time? A. That is my understanding.

RXQ. 47. That this equipment was on the operation, was on the work covered by Change Order Number Three? A. That is my understanding, yes.

RXQ. 48. It is true, is it not, when you applied the monthly rate to a piece of equipment no deduction was made for time lost due to Sundays or Holidays or other idle time? A. That is correct.

RXQ. 49. That is correct, you say? A. That is correct, yes, sir.

RXQ. 50. I believe you said that, in connection with the screening plant, you used an ownership rate of 6.7% per month. Is that correct? A. I believe that is correct; I don't remember the figures in that tabulation but I believe that is correct. That is on the screening plant.

RXQ. 51. And what length of life on the pieces of equipment does that rate contemplate? A. It contemplates a life of six years.

RXQ. 52. Do you know what the life of the screening plant in issue was? A. I don't know what the actual life of it was, no, because, as I understand it, the machine was shipped off the job after completion of the dam. I don't know what the condition of it was.

RXQ. 53. You said, did you not, you computed the rates that were used in the adjustment under Change Order Number Three? A. Yes, sir; that is right.

RXQ. 54. And computed the amounts allowed?

A. That is correct.

1687 RXQ. 55. And do I understand you to say also that you don't know whether the hours, total hours, used represents the hours that the equipment was actually operated or hours that it was assigned to the work in borrow pit number two?

A. I don't know who figured those hours. They came from the project. As I understand it, they were submitted by the Contractor.

RXQ. 56. It didn't make any difference to you?

A. We assumed they were correct, of course.

RXQ. 57. Which did you think they were, hours of operation or hours that the equipment was assigned to work on borrow pit number two? A. We took it that the hours submitted were the hours assigned to that job, that particular operation.

RXQ. 58. Whether it was working or not? A. That is right.

RXQ. 59. I believe you testified that you used a figure of 30c for maintenance on the Lima dragline; that is 30c per hour; and I believe you also testified that you felt that that maintenance on the Lima dragline was comparable to a maintenance on a D8 tractor; is that correct? A. I thought it would be a little higher than on a D8 tractor.

RXQ. 60. You thought it would be a little higher? A. Yes, sir.

RXQ. 61. The difference in the value or the size of the equipment would make no difference



1688 then, is that correct? A. No, the capital valuation and the size of the equipment doesn't necessarily have anything to do with the maintenance work. It is the class of work that the equipment is working on, operating conditions would determine that.

RXQ. 62. And where did you get the figures that you used for maintenance on the Lima dragline?

A. Just on the Lima?

RXQ. 63. That's right. A. Well, as I testified before, that those maintenance figures we got from a composite figure, you might say, taken from various sources, from other jobs that are operated in similar conditions, using similar equipment.

RXQ. 64. Do I understand that you made a study of operations in connection with your Bureau work and also that of other government agencies? A. That's right.

RXQ. 65. And what did you do, did you average those? A. Well, no, I wouldn't say we averaged them; we tried to, you might say. It was an average, not an average of all of them, an average of similar jobs, similar where conditions were similar.

RXQ. 66. Do you know what the figure is that the Highway Department had on the Lima? A. I don't remember, no.

RXQ. 67. Do you have that information available? A. I think perhaps we have; probably figure it up. All these figures are on hand.

1689 Commissioner Evans: What are these figures pertaining to?

Mr. Ruddiman: These are figures for maintenance of various pieces of equipment.

By Mr. Ruddiman:

RXQ. 68. Well, just how did you arrive at the 30c figure used on the Lima dragline? Do I understand that you looked at the figure of the Highway Department, certification of your own, certification of the Bureau of Public Roads? A. That is the way we arrived at them, yes. We considered the jobs that these pieces of equipment were operating on, tried to arrive at a comparable rate that would apply to conditions similar to what the Contractor was operating at, such as altitude, type of excavation, such as that.

RXQ. 69. And do you have the data which you studied in arriving at your rate of 30c on the Lima dragline? A. I wouldn't say definitely that we have it but I expect it is over in the office.

RXQ. 70. Will you furnish it to the Court? A. If I can find it I will, yes, sir; I wouldn't guarantee that we have it because all that stuff is six or seven years old, lots of it; the data is probably misplaced or lost, but I can try to find it.

RXQ. 71. Suppose that a Lima dragline works—strike that. Suppose that a Lima dragline is assigned to extra work and works for a period of thirty days and that during that time it works sixteen hours a day, seven days a week. Will 1690 the daily rate, multiplied by thirty, equal

the monthly rate as used in the Bureau's schedule? A. Yes, it should.

RXQ. 72. Well, suppose a piece of equipment, a Lima dragline, is assigned to extra work for a period of thirty days and that, during that time, it works sixteen hours a day for six days a week and loses five days due to bad weather and breakdowns. How would you compute the hourly rate on such a case? A. Are you figuring that for just a week? I have to ask you a question. What is the total period you are figuring that?

RXQ. 73. Thirty days.

(The question was read.)

RXQ. 74. Might I add one other factor. That it loses—there are four Sundays in a month and it loses four Sundays out of the month in addition to other days which I mentioned. A. Be paid the standard monthly rate because that allows no deductions for Sundays or holidays.

Commissioner Evans: Do I understand in that case you would apply the standard month rate rather than the hourly rate?

The Witness: That is right.

By Mr. Ruddiman:

RXQ. 75. That is the basis upon which the A.G.C. rate should be applied, monthly rate? A. Yes, sir.

Mr. Ruddiman: That is all. Off the record, please?

Commissioner Evans: Off the record.

1691 (Whereupon there was unrecorded discussion.)

Commissioner Evans: On the record.

RXQ. 76. By Mr. Ruddiman: Do I understand that in the Bureau's schedule of equipment rental rates, you use the same elements and the same percentages for ownership expense as are used in the A.G.C. schedule of equipment ownership expense?

A. Yes, that is correct.

RXQ. 77. It is true, is it not, that those rates should be applied in the manner set out in the A.G.C. schedule of equipment ownership expense?

A. That is true, in so far as the A.G.C. equipment ownership expense schedule specifies. They don't go into very great detail on instructions in how to apply these rates.

RXQ. 78. It is true, is it not, that the A.G.C. schedule of equipment ownership expense states that the monthly rate is not subject to deductions for Sundays or Holidays and should be charged for the full calendar period elapsing between shipments to and from the job? A. Yes, it states that.

RXQ. 79. And it is true, is it not, that the monthly rate used by the Bureau should be applied in the same fashion in orders for extra work? A. That's right.

RXQ. 80. The same is—the statement submitted by the Contractor in connection with Change Order Number Three. Withdraw that question.

It is true, is it not, that the hourly rates for



1692 maintenance used by the Bureau in connection with the claim under Change Order Number Three, are not based upon the actual experience on this job? A. Well, in some cases, these rates—no, I wouldn't say they are based exactly—You mean we didn't take your maintenance rates?

RXQ. 81. They are not based on any cost figures on the Vallecito job? A. Maintenance, you mean?

RXQ. 82. That's right. A. No, I don't believe they are.

Mr. Ruddiman: That's all.

Mr. Sweeney: That's all.

Commissioner Evans: We will note a recess.

(Whereupon a short recess was taken.)

Commissioner Evans: The hearing will be in order.

1693 Mr. Sweeney: Mr. Trenam, will you take the stand, please.

**Milton E. Trenam**, returned to the witness stand, having been previously sworn, and testified as follows:

Direct Examination on Claim No. 17

By Mr. Sweeney:

Q. 41. We show you, please, Exhibit 17-X, pages one to seven inclusive. Refer, please, to page four and particularly the red figures thereon and tell His Honor, did you make them and if so explain them. A. Yes, I made these figures. The figures in

red are substituted for those in black. After the final estimate was prepared and checked and they show the exact quantities of material that were excavated during the various periods shown here. They are the figures that were used in the final estimate for payment to the Contractor for excavation.

Mr. Sweeney: Take the witness.

Mr. Ruddiman: No cross.

Mr. Sweeney: I believe the document was offered subject to that explanation.

Commissioner Evans: That is right.

1694 **Jean R. Walton**, returned to the witness stand, having been previously sworn, and testified as follows:

Redirect Examination on Claim No. 17

By Mr. Sweeney:

RDQ. 1158. I show you a document marked Defendant's Exhibit 17-Z. Tell his Honor what it is.

(The document above referred to, marked Defendant's Exhibit No. 17-Z for identification, is filed in connection with this case.)

A. This exhibit is a tabulation of equipment hours prepared by me showing the hours that the various items of equipment operated during January, February and March, 1940.

RDQ. 1159. And what is its purpose, please, with respect to this claim? A. It is to illustrate some of the testimony that I will give.

Commissioner Evans: From what were the figures taken?

The Witness: The figures were taken from a load count furnished the government by the Contractor during these periods of operation and from inspectors' reports.

Mr. Ruddiman: Can you tell me what operations are involved in this exhibit?

The Witness: I can. Hauling riprap from the rock quarry to the embankment.

Mr. Ruddiman: I object to the introduction of this exhibit as having nothing to do with the claims which cover excavations of borrow pit number two.

RDQ. 1160. Will you explain that to His Honor? A. This exhibit does have something to do with this claim because the Contractor has computed rates on hours of operation, total hours of operation for a year and he shows no hours of operation for these periods there. In other words, he shows that the equipment was operating only from April through November and this equipment was operating during January, February and March.

Commissioner Evans: Objection overruled. The document is received.

(The document above referred to, previously marked Defendant's Exhibit No. 17-Z for identification, is now received in evidence and filed in connection with this case.)

By Mr. Sweeney:

RDQ. 1161. I show you Defendant's Exhibit 17-AA. Tell His Honor what it is.

(The document above referred to, marked Defendant's Exhibit No. 17-AA for identification, is filed in connection with this case.)

A. This is a tabulation prepared by me which shows in detail the breakdown of the total hourly equipment rental rates as used by the Bureau of Reclamation in computing the adjustment of compensation under Order for Changes Number Three. It also shows the breakdown as shown by the Plaintiff in his Exhibit 17-E and also a breakdown of similar pieces of equipment as reflected in cost data from the Panama Canal Commission. It will be used in explaining some of my testimony.

1696 Mr. Sweeney: It is now offered to be used to illustrate the testimony given by the witness.

Mr. Ruddiman: I object to this exhibit, Your Honor. It purports to show certain costs on the Panama Canal job and that has nothing whatsoever to do with this claim.

Mr. Sweeney: It may be noted, if Your Honor please, this data was taken from an exhibit already in evidence.

Commissioner Evans: The objection is overruled. It will be received.

Mr. Ruddiman: Exception.

(The document above referred to, previously marked Defendant's Exhibit No. 17-AA for Identification, is now received in evidence and filed in connection with this case.)



RDQ. 1162. (By Mr. Sweeney) I show you a document marked Defendant's Exhibit 17-BB for Identification. Tell His Honor what it is.

(The document above referred to, marked Defendant's Exhibit No. 17-BB for Identification, is filed in connection with this case.)

A. This exhibit is data prepared by me which shows a percentage of the capital valuation of each piece of equipment as reflected by maintenance charges in the Contractor's or the Plaintiff's Exhibit 17,E. It also lists the percentage of capital valuation as allowed by the A.G.C. for major repairs which has been included in the Plaintiff's ownership expense hourly rate and then shows a total that is charged for maintenance and major repairs on a basis of percentage of capital valuation for the year's operation. It will be illustrated in my testimony.

Mr. Sweeney: It is now offered, Your Honor.

Recross Examination on CLAIM No. 17

By Mr. Ruddiman:

RXQ. 1163. In the column "Maintenance April to November, 1940" where are the figures taken from? A. They are taken from Plaintiff's Exhibit 17-D.

RXQ. 1164. And the next column? A. Just a minute. Column "Maintenance April to November 1940" is taken from Plaintiff's Exhibit 17-D.

RXQ. 1165. The next column? Headed "Maintenance Percent Per Year"? How do you arrive at the figures in that column? A. By dividing the amount of capitalization into the amount charged for maintenance.

RXQ. 1166. And the next column, "Major Repair Percentages Per Year." Where do you get the percentages in that column? A. That is taken from the A.G.C. schedule and is included in the amount that the contractor has included in its ownership. That is included in Plaintiff's Exhibit 17-E, under "Total Rental for Year."

RXQ. 1167. How do you know whether major repairs are included? A. I know what the A.G.C. Manual says; I know the rate that the Contractor is paid or has applied here which are the rates in the A.G.C. Manual.

RXQ. 1168. Have you made any examination of Plaintiff's figures on the cost of repairs and maintenance? A. I made an examination of Plaintiff's Exhibit 17-E and 17-D and these are reflected in those exhibits. In other words, if you take the percent set up here, the approximate percent of capital value per year, this is applied per month, there is included in that this percentage that is for major repairs.

RXQ. 1169. Then the percentages appearing in the column "Major Repairs," are percentages taken from the A.G.C. schedule. Is that correct? A. Correct. And the total, last column, is a total—

in other words, it is a summation of the major repair percentages plus the maintenance percentages. I will explain this in my testimony.

Mr. Ruddiman: No objection.

Commissioner Evans: So received.

(The document above referred to, previously marked Defendant's Exhibit No. 17-BB for Identification, is now received in evidence and is filed in connection with this case.)

\* Redirect Examination on CLAIM No. 17

By Mr. Sweeney:

RDQ. 1170. Mr. Walton, please, I wish to ask you certain preliminary questions before we touch the exhibits that have just been offered.

Now, in regard to Order for Changes Number Three, explain that to his Honor. A. Order 1699 for Changes Number Three is a Form B order directing the Contractor to do the work in borrow pit number two that was issued because an agreement could not be reached between the Contractor and the Contracting Officer. Order for Changes Number Three directed the Contractor to perform the work and also states that any claim for adjustment in the amount due under the contract by reason of the changes shall be stated and filed with the Contracting Officer within ninety days from the date of the order. It does not state anything about cost-plus ten percent, as the Contractor's statement of claim is submitted.

RDQ. 1171. Now, with respect, please, to Contractor's statement of claim, tell His Honor, please, were changes made in that from time to time? A. The initial statement of claim received from the Contractor was delivered to the project office amounted to \$334,994.42. This was revised upward approximately \$30,000 by the detailed statement dated April 8, 1941. This was again revised upwards \$23,000 by the statement dated June 23, 1942 and in the exhibits placed in evidence by the Plaintiff in the hearings an entirely different statement of claim was introduced in which the rental rates were entirely different. This revised the figure upwards about, approximately, \$60,000 over and above the amount as stated in the final release from Contract.

RDQ. 1172. Do you mean by that that Plaintiff has, in presenting proofs in court, resorted to different methods of calculation of the claim 1700 than in submitting it to the Contracting Officer? A. That is right.

RDQ. 1173. Now please, in respect to this matter of maintenance rates, explain that fully to His Honor. A. The maintenance rates as allowed by the Bureau of Reclamation was furnished the project by the Denver office, as explained by Mr. Nixon. The maintenance, as shown by the Contractor, is reflected in its exhibit, Plaintiff's Exhibit 17-D. Maintenance, as is the general practice on most construction jobs, applies only to minor repairs,



repairs that require a piece of equipment to be out of operation not over one shift. Does that sufficiently cover your question?

RDQ. 1174. I just wanted you to explain to His Honor what is meant and what it includes. A. Maintenance and minor repairs are identical.

RDQ. 1175. Now please, with respect to the equipment that is involved in the computations of data that you have prepared for the Court on the basis of which you make a comparison between the Bureau's rates, Plaintiff's rates and actual costs. First, please, did you see the various items of equipment, as it was brought to the job, involved in this claim? A. I did. I was on the job when all the equipment arrived.

RDQ. 1176. Tell His Honor please, what was the condition of the equipment when it came on the job? A. The first equipment on the job was brought off a job that the Contractor was completing on

Wolf Creek Pass, consisting of Caterpillar 1701 tractors and carryall scrapers. The tractors that first arrived on the job, most of them were in very poor condition and were given major repairs before they did very much work on the job.

The Lima dragline, I think, and also the Lorain shovel came from the Wolf Creek Job during the later part of—or the summer of 1938. These were in only fair condition. They apparently had not been put in first class condition before they arrived on the job.

RDQ. 1177. Now, with respect generally to the condition of all the equipment that is involved in this particular claim? A. Practically every item of equipment that came to the job with the exception of possibly the Euclid trucks and I don't think all of them were new when they arrived there. There was equipment that had been used for a considerable period of time.

There is one other item of equipment besides the Euclid trucks—one sheepsfoot roller. Some of the sheepsfoot rollers, when they arrived on the job were just a little bit above the junk heap and were completely overhauled and practically rebuilt by the Contractor on the job. Some of the other equipment was old and practically worn out when it arrived there.

However, these Euclid trucks, part of them were new and most of them were practically new and in good condition.

The screening plant was new when it arrived on the job.

RDQ. 1178. Now, with respect please to what is called minor repairs, will you describe that in some detail to us? A. As I have just explained, minor repairs, I would say, are the same as maintenance and covers repairs that are made to a piece of equipment intailing its being off the job for only a short period. It is usually standard practice to consider anything that requires a piece of equipment to be down for not over a shift to be classed

as minor repairs or maintenance and anything that requires it to be down longer than this to go in major repairs.

RDQ. 1179. Now, the same question; what are major repairs? A. Well, I would say major repairs are where a piece of equipment is required to be out of operation as much as a shift or more.

RDQ. 1180. Now, when the job was finished and the equipment was moved off, what was its condition at the time it was taken off the job and it was completed? A. Following the shutting down of most of the work on about November 6th, 1940, the Contractor was immediately getting this equipment ready, or the major portion of it ready, to ship out to another job which, I was told by Mr. Stewart and the Contractor's general foreman, was going to this job in Panama. I saw the equipment as it left the job. I can't say where it went to.

RDQ. 1181. Now, what was the condition when it left the job? A. The equipment that was taken out of there, presumably to go to Panama, had been overhauled and was in good condition.

1703 RDQ. 1182. Now, with respect, please, to the cost of these minor and major repairs that you have told His Honor about, are they reflected in the costs of the Plaintiff? In other words, are they charged to this job? A. You say minor repairs?

RDQ. 1183. Everything, minor and major repairs, is it all charged to this job? A. All repairs—

I haven't examined the Plaintiff's books; I couldn't say what comprises it but there is an item for maintenance and another item for major repairs so I presume all repairs made to this equipment are in this cost.

Mr. Ruddiman: I object to his testifying as to assumptions. Let him testify as to facts.

Commissioner Evans: It has to do with the figures. Objection overruled.

Mr. Ruddiman: Exception.

By Mr. Sweeney:

RDQ. 1184. With respect to accessories that were used or to be used in connection with the repairing or rebuilding any of this equipment involved in this claim, tell His Honor, were such accessories brought to the job and charged to this job? A. I don't know exactly what you mean by accessories.

RDQ. 1185. Repair parts. A. You mean changes made?

RDQ. 1186. Yes. A. The changes made to the Lima dragline has been explained by Mr. Nixon, which was taken care of by increases in capital valuation of the dragline. It is the practice of lots of contractors—I can't say it was here—that when repair parts are received on the job, they are charged directly to the items of equipment for which they are purchased irrespective of when they go on the equipment or into stock.



Mr. Ruddiman: I move to strike that testimony as to what other contractors do. It has no bearing on what was done here.

Commissioner Evans: Motion denied on the ground that the testimony given by the witness has to do with the value to be ascribed to his testimony as to his own computations.

Mr. Ruddiman: Exception.

By Mr. Sweeney:

RDQ. 1187. Now please, when the equipment was moved off the job, with respect thereto, were there any spare parts remaining and were they moved or not? A. I can't say how many. I saw some of the trucks leaving the job loaded with spare parts. I would say, by casual observation of the Contractor's stockroom at the later part of the job, there was a considerable quantity of spare parts that was moved off the job.

RDQ. 1188. Now please, will you refer to the tabulated data that you have prepared to illustrate to the Court your testimony touching the comparative rental rates as computed by both parties and also the actual costs? Now just explain in detail to His Honor. A. First, I would like to go into this A.G.C. schedule slightly and that is the basis from which the Bureau Equipment Rental Schedule, Plaintiff's Exhibit 17-C, is made. The A.G.C. Schedule, which is Plaintiff's Exhibit 17-B, sets up under each item of equipment

what is called an "Expense Per Working Month," based on the percentage of the capital valuation of the equipment. Items which go into make up this expense per working month, which I will refer to as "Ownership Expense," is composed of an item for depreciation and an item for—these are all set up in percentages—overhauling, major repairs and painting; item four, interest, taxes, storage and insurance, which gives a total percentage of ownership expense. This total ownership expense for the year is divided by the average number of months that this piece of equipment would be expected to work during a year. This is based on average conditions. This gives us the expense per working month on a percent factor.

This percent factor that the Contractor has used in his computations, shown on Plaintiff's Exhibit 17-E under the heading "Approximate Percent of Capital Value Per Month," it will be noted, includes in each instance a percent for major repairs of the equipment, overhauling and maintenance.

This Bureau of Reclamation Equipment Schedule, for instance, any piece of equipment, there is a column in there headed "A.G.C. Data." Under this, for each piece of equipment—this is also Plaintiff's Exhibit 17-C—is shown taken from the

A.G.C. Manual the economic life years of the 1706 equipment, the annual use in months, and the rental rate per month, as reflected under the "Average Use Per Month" or the "Expense Per Working Month" in the A.G.C. Manual. Now

this forms the basis for the computation for what is shown as "Actual Rental Rates" set up in the Bureau Equipment Rental Schedule as a monthly rate, extra shift rate, and an hourly rate. This hourly rate is to be used where equipment is used for small lengths of time—small durations, not to exceed one hundred per month. The shift rate is to be used where the work—where the equipment is working one shift per day, not to exceed thirty per month. Extra shift is to be used where the equipment is working two shifts or three shifts and is to be applied for the extra shift per month.

In other words, if a piece of equipment is working two shifts per month, say, you take the sum of what is shown as the shift rate and then plus what is shown as extra shift rate and that gives the total for the two shifts in operation. This is based on the A.G.C.

The specifications, under paragraph ten, "Extras," states, "In extra work orders and change orders that costs shall include all expenditures for material, labor (including compensation insurance) and supplies furnished by the contractor or/and a reasonable allowance for the use of his plant and equipment where required, to be agreed upon in writing before the work is begun; but in no case will include allowance for office expense, general superintendents and other general expenses." It will be noted that this states "A reasonable allowance." No reference is made to the A.G.C. Schedule.

1707 The computation, as was previously explained by Mr. Nixon, of the Bureau of Reclamation rental rates includes an ownership expense hourly rate which is based on—taken from Plaintiff's Exhibit 17-C—a two-shift operation plus a maintenance allowance for maintenance per hour plus allowance for fuel and lubrication costs per hour and these are added to give the total rental rate as computed by the Bureau of Reclamation.

In making these computations, in order to be fair, the capital valuation of new equipment is, in all cases, used. This is set up as brand new equipment rate that would be charged for brand new equipment. In this particular instance here, practically none of the equipment—in fact none but the two 18-yard Euclid trucks—were new at the time this work was involved.

The rates so determined were used in computing the Contracting Officer's proposed allowance for additional compensation for order for Changes Number Three, which, it was felt, gave an equitable additional compensation to the Contractor for performance of this work which amounts to a little—around \$45,000.

The rental rates used by the Bureau of Reclamation were submitted to the Contractor as was explained by Mr. Nixon in his testimony. This was at the request of Mr. Wunderlich in his letter of June 25, 1941.

1708 The capital valuation as shown in the Bu-



reau of Reclamation computation and as has been previously touched upon was for new equipment delivered to Salt Lake City, Utah, which is a comparable price to any area to which the Bureau of Reclamation work was in progress and was comparable to what it would have been at this job.

The Contractor introduced into evidence at previous hearings his exhibit, Plaintiff's Exhibit 17-E, 17-D and 17-F, which show the first complete breakdown of how the Contractor's equipment rental rates were arrived at. As that had been received by the government previously it had just been a rate based on hours. There was no breakdown on how the figure had been arrived at. Therefore, in preparing my computation of Exhibit 17-AA and also Exhibit 17-BB, I based it on data contained in Plaintiff's Exhibit 17-E, 17-D, and 17-F.

The Contractor's Exhibit 17-F has been computed by taking the capital valuation as shown on the Bureau of Reclamation schedule, not the actual cost to the Contractor of equipment, and applying the percent factor for monthly expense as shown in the A.G.C. Schedule, on the basis of months of operation. The Contractor has then taken the months of operation for one shift, based mostly on eight months and for the second shift, in most cases, of six months and by applying this percentage factor for eight months and half the percentage factor for six months, which is in accordance with what is shown here in A.G.C., and has arrived

at a total rental for the year. This total 1709 rental established for the year is what I show. From this total rental for the year the Contractor has divided this by the total so-called hours worked during 1940 to arrive at an hourly rate. In my exhibit 17-AA, I have this as headed "Ownership Expense Hourly Rate." The Contractor, for the period of hours worked in 1940, has failed completely to include the hours of operation during the months of January, February and March, which are part of the year 1940 and should be included in arriving at the hourly rate, if we are arriving at that by the total number of hours of operation divided into the total rent for the year.

These hours of operation during the months of January, February and March, for each of these items of equipment, is shown on Defendant's Exhibit 17-Z and would materially reduce the hourly rate shown for several items of equipment, especially the trucks and the Caterpillar D8 tractors. These hours of operation were taken from inspectors' reports and I think can be substantiated from the Contractor's own records.

This equipment was hauling riprap during this period of January, February and March from the rock borrow pit seven miles upstream from the dam to the dam. This would, as I have previously stated, substantially reduce this hourly rate as computed by the Contractor.

The fuel and lubricant rate, as shown on the

Contractor's Exhibit 17-E, is the same as shown on the Bureau of Reclamation's computation and is not a matter of dispute.

1710 The maintenance rates shown on the Contractor's schedule are, well, some ten to twenty times what is shown on the Bureau of Reclamation schedule and are considered by the Reclamation engineers as excessive. We have no way of knowing what goes in to make these maintenance rates up but, based on the amount of this rate, it is my opinion that they include all repairs made, not only maintenance by overhaul, general repairs and all repairs that were made during the period and all parts used during the period.

Mr. Ruddiman: I object to what his opinion is.

Mr. Sweeney: The witness is certainly an expert and I believe he has a right to explain what these comparative figures show.

Commissioner Evans: Objection overruled. Go ahead.

A. (Continuing) By adding in, as the Contractor has, to his hourly rate, the so-called maintenance rate and the Bureau of Reclamation fuel and lube rate, which is not a point of controversy, the Contractor arrives at a total hourly rate used in the computation to arrive at the total amount of his claim shown in Plaintiff's Exhibit 17-F, of some \$422,000 which, of course—from which, of course—is deducted the amount that is actually paid which amounts to about \$194,000. This has actually been paid.

Commissioner Evans: Do you understand the Contractor has used the term "maintenance" to mean the same as you take it to mean?

The Witness: I don't know what it includes but I am of the opinion that it includes major repairs, overhaul, all work that was done in repairing that equipment and all parts that went into it.

Commissioner Evans: Does the Contractor have additional figures for major repairs?

The Witness: Yes, I have an exhibit here showing that.

Commissioner Evans: Go ahead.

A. (Continuing) On my exhibit, or on the Plaintiff's Exhibit 17-BB—Defendant's Exhibit 17-BB I have listed each item of equipment that is involved in this item of claim and set up under the first column, or second column, the capital value of the equipment as used by the Bureau of Reclamation and also as used by the Contractor although most of this equipment was old equipment at the time it was put in use. This is the capital value of brand new equipment. In the second column I show the maintenance from April to November, 1940—the so-called maintenance from April to November, 1940, as reflected by Plaintiff's Exhibit 17-D. In the fourth column is the percent factor which would be the percent of capital valuation that the Contractor is asking for maintenance. Mind you, this is for minor repairs for the year. In the fifth



column I have set up the major repair that is the percentage of the capital valuation as allowed by the A.G.C. for major repairs which is also included in the Contractor's hourly rate as shown on Plaintiff's Exhibit 17-E. In the final column I show the sum of the percent of capital valuation for major repairs as used by the Contractor and the percent used for maintenance giving a total percent 1712 for all repairs for the year in a percentage of capital valuation of the piece of equipment, that is, if it was new equipment.

Commissioner Evans: Is it possible to obtain from the A.G.C. RATES a comparable figure of total percentages for maintenance and major repairs?

The Witness: No, sir. The A.G.C. sets up a percentage for maintenance or repairs only and doesn't set up anything for maintenance.

What I am trying to develop here is that in some cases here, for instance, we'll take the D8 tractors. The A.G.C. allows a contractor, and this is based on experience over numerous contractors, fifteen percent of the capital valuation of a D8 tractor for major repairs for a period of a year. The contractor, in addition to allowing this fifteen percent for major repairs, has added on fifty-nine and seven tenths percent of capital valuation for so-called maintenance or minor repairs. Undoubtedly the major repairs would have amounted to far more than minor repairs or maintenance.

This is also true on down the line with practically all items of equipment with the possible exception of Euclid-20-yard, bottom dump trac-trucks. The figure shown there for maintenance for a year is 5.9%. Surely a 20-yard Euclid, which is a much heavier, larger piece of equipment, the maintenance would be higher than it would be for a 12-yard Euclid which is a smaller piece of 1713 equipment.

It will be noted in the case of the sheeps-foot roller that the Contractor has charged for maintenance, April to November, 1940, \$5,471 against a total capital valuation of \$3,168. In other words, it would have been cheaper to have gone out and bought a new roller.

It will also be noted that in the case of the RD8 tractors, the capital valuation of these tractors, \$71,145. The Contractor charges for maintenance, April to November, 1940, a figure of \$42,533.00 for maintenance allowance; it doesn't include major repairs which is 59.7% of capital valuation of the equipment.

In Defendant's Exhibit 17-AA I have listed all items of equipment that are involved in this claim and a few that are not involved in this claim but are involved in some of the other claims, and give a complete breakdown of the Bureau of Reclamation rental rates as used in computing the additional allowances proposed to the Contractor under order for Changes Number Three, as against this

I have listed here the same features or breakdown of the total hourly rate as computed by the Contractor and also the same as reflected in the Panama Canal cost report on the contract performed by the same contractor on that job, as a comparison.

It will be noted that the figures used in here are taken from the Panama Canal cost report and are those shown in the report less the cost of operating, labor; that is, the cost of the shovel operator, drag-line operator which, in no case, is an inclusion in the Bureau of Reclamation or Contractor's 1714 rates.

It will be noted in this comparison that in each case the maintenance, at the hourly rate, allowed by the government for these various items of equipment that are similar or identical items of equipment, are in all cases higher than the amount that is allowed or the amount of the actual costs for minor repairs which is the same thing, on this Panama job.

The Panama job, the Plaintiff will say, is not a comparable operation; equipment operation will vary from job to job but it would be somewhat comparable to the work on the Vallecito Dam. It is at a high altitude and we had considerable rain through the summer. The work in the tropics—of which I spent some time in the tropics—is also a good deal of it performed in rain and mud conditions, and I think the minor repairs from job to job would not vary a great deal.

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\*The major repairs would vary a great deal, depending on whether the equipment was new or was old, worn out equipment.

It will be noted on this comparison here that on the Bureau of Reclamation basis all equipment is on a two-shift basis with the exception of the items that are indicated, which are: Lorain dragline, International truck, the Kohler light plant, and the Euclid utility tractor; these were based on a one-shift basis.

It can be readily seen that the Contractor's maintenance rates are far in excess of what was determined by the government engineers to be equitable maintenance hourly rates and also what were the actual minor repair rates on this Panama 1715 job.

Now the costs reports on this Panama job, or the equipment—the tractors or the shovels and draglines, were lumped together as equipment and there were five of them used as is reflected by this report. That accounts for the rates shown under Lima dragline and Lima shovel, under Panama Canal, as being identical. The others, I think (the tractors and Euclids)—in fact, I think some of these are similar or possibly identical pieces of equipment.

Commissioner Evans: We will take a short recess.

(Whereupon, a short recess was taken.)

Commissioner Evans: The hearing will be in order.



**Jean R. Walton**, resumed the stand and testified further as follows:

Redirect. Examination (Cont'd.)

By Mr. Sweeney:

A. The Contractor's first detailed statement of claim, as I remember, was dated April 5th, 1941, gave a detailed breakdown on labor and equipment, and this was used by the Contracting Officer in computing or as a basis for computing the adjustment of compensation that was considered equitable.

By Commissioner Evans:

RDQ. 1189. Is that estimate in evidence? A. I don't believe it is.

Mr. Ruddiman: I think it was introduced at the first hearing in this case.

By Commissioner Evans:

RDQ. 1190. Can you give us a reference 1716. to it? A. I believe so.

Commissioner Evans: If not we'll put it in evidence right after lunch. I thought it was already in.

Mr. Sweeney: It appears there are two letters of the same date.

Mr. Ruddiman: If the Court please, it would be a part of Plaintiff's Exhibit 17 which includes considerable correspondence.

The Witness: I don't believe it is in the findings of fact; the amount is in there but the detail is not.

Commissioner Evans: You have a copy which will be supplied?

The Witness: We'll put it in evidence.

Commissioner Evans: Very well. Proceed.

The Witness: (Continuing) Today.

The Contractor submitted a summary along with all the details of the hours of labor, materials, and the hours of equipment use, for which claim for additional compensation was being made.

By Commissioner Evans:

RDQ. 1191. On claim 17? A. On claim 17. The order for Changes Number Three did not state that payment would be made on cost-plus-ten-percent and also did not state that any equitable adjustment would be computed in total operations in borrow pit number two, including excavating, hauling, removal of plus-five-inch stones. That is the reason that that report of mine that was introduced 1717 as Defendant's Exhibit 17-E and also Defendant's Exhibit 17-F-1, which was completed previous to this time was based strictly on the work involved in removal of plus-five-inch stones from the material; but the Contractor submitted his statement of claim in detail covering the entire operations in borrow pit number two and after the Contracting Officer had studied the Contractor's submission of claim and comparison had been made, it was found that the hours of labor was substantially correct, the materials used was substantially correct and that the hours of operation

of equipment in performing work in borrow pit number two was substantially correct with a few corrections. Therefore, because of the fact that the Contractor had so submitted its claim, the Contracting officer found that by the application of what was considered a fair rental allowance instead of the rental allowance as used by the Contractor, that an equitable adjustment was reached. The Contractor showed, in its statement of claim, actual hours of operation for the various items of equipment in performing the total work in borrow pit number two. These substantially agreed with government records. Therefore, the only way that this could be used as a basis in calculating the additional compensation was on the hours of operation of the equipment and that is the reason that the government engineers used an hourly 1718 basis.

The equipment, with the exception of two or three small items which I have previously called attention to, all worked on a two-shift basis. The equipment did not work entirely on work that is involved in this claim, with the possible exception of the screening plant; other items of equipment would work maybe for half a day over in borrow pit number two and then maybe they were moved on the other side of the river and worked in borrow pit number one. Maybe the trucks would haul from borrow pit two part of the time and part from borrow pit number one. It was absolutely impossible

to break this down except on an hourly basis—that is, hours of operation in borrow pit number two.

The rental rates could not be applied on a monthly rate because part of the month the equipment was working in work involved in this claim and part of the time working in an entirely different portion of the work on the job.

RDQ. 1192. Was any allowance made in your hourly allowance for idle time? A. The rates were computed on an hourly rate and then these hourly rates were applied to the actual hours of operation.

RDQ. 1193. But no allowance was made as against this work for time that the equipment might have been idle, is that correct? A. That is correct.

Commissioner Evans: Go ahead.

A. (Continuing) The equipment that was used over here in borrow pit number two, for the 1719 most part would operate, possibly, a shift in that borrow pit then would move somewhere else for a shift. That is, a lot of trucks did that and some of the excavating equipment did that.

The screening plant was brought on the job in 1938 for use in separating materials that were set up in the specifications under items that required separation. This consisted of excavations from the outlet works, the spillway, the diversion channel and the cut-off trenches.

The plant was bought new, brought onto the job in 1938 and set up at the downstream side of the



dam and was used for separating all of the various items of work that were so set up, with the exception of the 50,000 yards set up to be separated from cobble borrow pit.

At the close of the 1939 construction season, all of this work had been completed—all this required structural excavation. The screening plant had accomplished all the work with the exception of the 50,000 yards set up in the specifications for which it was purchased and brought onto the job. It was then at the Contractor's own decision that they elected to set it up in borrow pit number two and used it to remove the plus-five-inch stones from the material excavated from borrow pit number two.

The Contractor, in arriving at his rental rates has used as a basis for depreciation of the screening plant a three-year life and has used as a comparable piece of equipment a sheepsfoot roller in 1720 which the A.G.C. Schedule sets up a three-year life. There is absolutely no comparison between the operations of a sheepsfoot roller and a separating plant.

The government engineers have used, for depreciation, a six-year life which is taken from a comparable piece of equipment—a heavy duty crusher—and the rate as shown for a heavy duty crusher (which is based on a six-year life) and six months average operation per year) setting up an expense per working month of 6.7% was used.

RDQ. 1194. Does not the A.G.C. Schedule include a separation plant? A. There is no separation

plant listed in there. The most comparable piece of equipment in there is under "Pit and Quarry Plants, Portable" and are crushing, screening and loading equipment and this piece of equipment to which I refer is listed under "Pit and Quarry Plants—Crushing, Screening and Loading—Heavy Duty, Single Crusher, Large Capacity," which is more of a comparable piece of equipment.

Now the Contractor has brought out in Plaintiff's testimony that although this plant was used for 1938, 1939 and 1940, that at the end of 1940, for all practical purposes, it was junked. The operation at the plant at the close of 1940 season was far more successful and was, I would say, a much better plant than at any time that it was in operation on the job. I don't think there is any question but if the plant was moved to another job it could have been used for another three years with a small amount of repair work.

The Contractor has also included in their cost of the separating plant the repairs that were made to it before it was put in operation for 1940 which, I think, are chargeable to the work done in 1938 and 1939. In other words, if we are setting up a plant at \$20,000 as a new plant, it should be in condition—at least in comparable condition—as it was when it arrived on the job. This figure of \$20,000 that the government has used as capital valuation of the separating plant, is not a figure as testified by the Plaintiff's witnesses a figure that was set up by

the Bureau of Reclamation; it is a figure that was given me by Mr. Wunderlich when the plant first arrived on the job. Mr. Wunderlich told me the plant cost \$20,000. We didn't question it and that is the figure we set up and used for capital valuation. I learned since it did not cost, or at least the Contractor did not pay \$20,000 for it. I think another law suit revealed that the Contractor actually paid—

Mr. Ruddiman: I object to any reference being made to other lawsuits.

Commissioner Evans: You don't know anything about that lawsuit, do you?

The Witness: No, sir.

Commissioner Evans: All right, leave it out.

1722 A. (Continuing) As a basis of comparison as shown on Exhibit 17-AA, I would like to take just a representative piece of equipment and go across the various columns to show what is shown on this exhibit.

RDQ. 1195. Which Exhibit? A. Defendant's Exhibit 17-AA. Under the first column, under "Item", is the item of equipment.

Under the next column is the number that were on the project that are involved in this claim.

In the next column, that is the third column, is the capital value as reflected by the Bureau of Reclamation "Equipment Rental Schedule". It will be noted that the Contractor has just used this same capital value, although the equipment was not new equipment.

Under the next column is shown the average use per year as set out in the A.G.C. Schedule. Now this is based on the average over the life of the equipment, not one particular year, and this is the basis on which the ownership expense rate was computed by the Reclamation Engineers. In the Contractor's comparable column is "Hours Worked in 1940". This is the figure that the Contractor has entered as the total hours worked during 1940 in the Plaintiff's Exhibit 17-E which I have shown here does not include the hours worked in January, February and March. That is the hours worked for all nine Caterpillar tractors.

The government's column next reflects the ownership expense hourly rate which is \$1.44 compared to the item in the Contractor's computations of \$1.98.

In the next column, under Bureau of Reclamation Schedule is "Maintenance Hourly Rate" which is 24c as compared to the Contractor's maintenance rate of \$1.86.

Next is both the Contractor's and Bureau of Reclamation's Schedules is an item of 51c for fuel and lube cost. This was set up by the Bureau of Reclamation and accepted by the Contractor and is not a part of this dispute.

RDQ. 1196. On that piece of equipment?

Mr. Ruddiman: No dispute on any of the fuel and lubrication rates.

Commissioner Evans: Quite a difference in them.



Mr. Sweeney: The Plaintiff has the same as the Bureau figures on that, Your Honor.

The Witness: In only one case, I think, you will find there is much variation and that is in the Lima shovel. The Bureau used a figure of 97c and the Contractor used \$1.40, which is the same as the Lima dragline. Most of the others are substantially the same.

Commissioner Evans: Go ahead.

A. (Continuing) The Bureau of Reclamation arrived at a total hourly rate of \$2.19, while the Contractor arrived at a total hourly rate for the same piece of equipment, of \$4.35.

In both cases the hourly rate was then applied to the total hours of operation of these pieces of equipment and in performing this work to 1724 arrive at the total equipment allowance for the RD8 tractors.

It will be noted over under Panama Canal that the comparable figure of depreciation plus repairs which, in some respects, compares with the ownership expense, is \$2.16. Now this is computed on an entirely different basis as is brought out in the cost report, which is Defendant's Exhibit 17-R. The depreciation, as brought out in this report, is based on a straight line depreciation, taking the value—this is in capital cost figures—by taking the value of the equipment at the beginning of the job and appraised value of the equipment at the end of the job and making a straight line depreciation through the period of operation while depreciation

and ownership, everything, going into make up ownership expense as is shown in Bureau of Reclamation rates and I believe shown in Contractor's rates is based strictly on A.G.C. and the Bureau of Reclamation Equipment Rental Schedule.

It will be noted that on this same piece of equipment, RD8 Caterpillar tractor maintenance, the Bureau of Reclamation allowed 24c per hour and the Contractor allowed \$1.86; and minor repair rates, reflected by the Panama Canal rate is 16.6c per hour.

It will be noted also that the fuel and lube cost allowed by the Contractor in most instances, is higher than the costs are reflected on this Panama job and that the total hourly cost is at variance with either the Bureau of Reclamation or the Wunderlich Company rates due to the fact that an entirely different method was used in arriving at the depreciation.

The Plaintiff brought out in testimony in the hearings that the Contracting Officer, in his proposed adjustment for compensation for order for Changes Number Three, had not allowed anything for the moving and remodeling, erection and remodeling, of the screening plant, that is, for equipment. This is not exactly true. The government has allowed the allowance as shown in Defendant's Exhibit 17-F-1 for labor and equipment for both moving and erecting the plant between the period March 28, 1940, and May 11, 1940, and for remodel-

ing the plant between the period May 12, 1940, and June 21, 1940, or a total of, as reflected by Defendant's Exhibit 17-X-1, \$9,583.85 for moving, erecting, and remodeling the screening plant. Then, to make up the capital valuation of the screening plant, goes the items as shown on Defendant's Exhibit 17-AA; that is the separation plan proper valued at \$20,000, a Waukesha motor valued at \$1,261 and an International Motor valued at \$2,477 and a 50kwa generator valued at \$500.

Also included in the labor as shown in the adjustment of compensation that was proposed to the Contractor, is the actual labor performed during the work of excavating, hauling, and removing plus-five-inch rock from borrow pit number two. This figure that I have just called attention to for moving, erecting and remodeling of the 1726 screening plant and an allowance for compensation insurance, social security taxes, and unemployment compensation taxes, and ten percent for profit on labor and equipment allowance, is all lumped together under this as labor. Then there is another allowance for materials and another allowance for use of the equipment and operating expense of equipment. In addition to the allowance that was made in this for 1940 which totaled some \$40,400.15, is allowed \$3,800.70 which is on a yardage basis based on the unit cost during 1940, that the unit cost figure to \$40,400.

By Mr. Sweeney:

RDQ. 1197. Referring, please, to the method followed by the Plaintiff in calculating his hourly rates, tell His Honor please, is that in accordance with the method followed by A.G.C. rates? A. The application generally follows the A.G.C. Manual. The application in arriving at an hourly rate is, possibly, not in strict accordance with the A.G.C. Manual because of the fact that it was impossible to separate this equipment except on an hourly basis. In other words, the equipment was working part of the time on one phase of the job and part of the time on another phase where it could not be charged off by the month. The Contractor submitted his claim on an hourly basis and this was determined by the Contracting Officer to be a reasonable allowance for the use of his equipment 1727 and an equitable adjustment under order for Changes Number Three.

RDQ. 1198. Now, please, with respect to item of depreciation as noted in the A.G.C. Schedule, does the item of major shop repairs included depreciation? A. The item of depreciation is set up on a depreciation, for instance, I'll take a tractor which is an RD8 tractor. Under "Crawler Tractor, Diesel, 95 Horsepower," which is a D8, depreciation on the basis of 20% per year—that is on a five-year life—also set up under the average annual ownership expense is 15% for major repairs, overhauling, and painting. Now if a piece of equipment comes on



a job and is new and at the end of five years is totally scraped, this 20% per year the Contractor has set up as depreciation within a reserve, will replace this piece of equipment. In other words, he has set up 100% cost and could buy a new piece of equipment. It is only reasonable that if the Contractor completely rebuilds this piece of equipment and brings it back up to where it has practically initial value, some portion of depreciation set up is being used for rebuilding the equipment. In other words, if the contractor goes further than making major repairs and completely rebuilds a piece of equipment, it is only reasonable to assume that part of the reserve set up for depreciation is being used for rebuilding of this piece of equipment which would lengthen the life far beyond the five-year life of that piece of equipment. I think it is a fact that many contractors run tractors that are possibly running eight to ten years.

1728 RDQ. 1199. Tell His Honor please, are these facts you have just stated reflected in the A.G.C. Manual? A. Well, the A.G.C. Manual sets up 20% per year depreciation of a 95-horsepower tractor and also sets up a 15% for major repairs and overhauling and this goes into make up the total ownership expense.

RDQ. 1200. Does it include, please, having repairs or overhauling done in the contractor's shop?

A. It does. The major repairs or shop repairs are to include those items of heavy repair which usu-

ally keep a machine idle for an extended period and minor repairs are field repairs.

RDQ. 1201. Now, with respect to the repairs made by the Contractor on this job, were they done at the site of the project or somewhere else? Did he have his own shop? A. He had his own shop, yes. There were times when some pieces of equipment—I don't know exactly when—during these months there were times on the job when equipment was torn down and completely rebuilt from the ground up. That is, it was torn—

RDQ. 1202. Did you see that? A. I saw tractors in the Contractor's shop completely torn down to the frame and then repaired, new parts added wherever they were needed.

Mr. Sweeney: Take the witness.

1729 Commissioner Evans: We will recess for lunch. Be back at 1:45.

(Whereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., this same day.)

1730

AFTER RECESS

1:45 o'clock p.m.

Mr. Sweeney: Mr. Walton, refer to letter dated April 5, 1941. There appear to be two letters of that date, however, the pertinent letter is in evidence as a part of the Contracting Officer's Findings and is referred to as Defendant's Exhibit 22 in connection with Claim 17; in the document is Plaintiff's Exhibit C.

Commissioner Evans: Is that the first statement of claim by the Contractor?

The Witness: That is the first detailed statement, he made a statement of claim previous to that but that is the first that broke down the equipment in detail.

Commissioner Evans: That is the one to which we made some reference?

Mr. Sweeney: There are 179 pages and it means microfilming and it is not necessary.

Commissioner Evans: Had you completed your direct examination?

Mr. Sweeney: Yes, that is all.

#### Recross Examination on CLAIM No. 17

By Mr. Ruddiman:

RXQ. 1203. Mr. Walton, it is true, is it not, that the Contractor began that job with a considerable supply of parts for his equipment? A. I can't say definitely as to that. I don't remember seeing very many come in except periodically after the 1731 job started. I don't remember seeing a great quantity after—of supplies at the beginning of the job.

RXQ. 1204. You don't remember seeing truck loads of parts brought in from the road job? A. The Contractor used—

RXQ. 1205. You don't remember? A. I don't remember, no.

RXQ. 1206. Did I understand you to testify that

it was common practice to charge parts directly as equipment expense? A. I said that it was the practice of some contractors to do that. I didn't say it was common practice.

RXQ. 1207. Do you know whether that was done on this job? A. I have no way of knowing. I didn't examine the contract. I think it is possible it could have been done.

RXQ. 1208. I take it you have made actual checks of the cost of maintenance on this job, is that correct? A. Oh, that would have been impossible for us to do unless we put a large force of cost keepers and time keepers on the job. We made no effort to keep direct cost of the Contractor's operations by checking them on the job other than the definite items covered by this report put in as an exhibit.

1732 RXQ. 1209. You don't know what his actual cost for maintenance was then? A. I have no way of knowing.

RXQ. 1210. Do you know whether or not the Lima shovel began operations in borrow pit number two approximately around the first of April and continued there all the time until the end of November? A. The Lima shovel?

RXQ. 1211. The Lima shovel. A. I believe, if I remember correctly, that the Lima shovel worked after the shovel was moved into borrow pit two during 1940 that it remained in that pit most of the time.



RXQ. 1212. Practically all the time, is that not true? A. I can't say all the time, I can't say exactly; I probably could figure it up from the records on it.

RXQ. 1213: Was any monthly rental rate used by the government in connection with the Lima shovel? A. It wasn't used with anything, as I explained here in my testimony.

RXQ. 1214. Can you tell me approximately what quantity of cobble fill had to be placed after the end of the 1939 excavation season? A. I can tell you exactly how much was placed—during 1940.

RXQ. 1215. That's right. A. There were 1733 109,927 cubic yards of cobble fill placed in 1940.

RXQ. 1216. It is true, is it not, that the purpose of the separating plant used on this job was to separate the necessary cobbles to complete the dam? A. The separating plant, as I understand,—

RXQ. 1217. Can you answer that yes or no? A. Now let's get that question again.

(RXQ. 1217. was read by the reporter.)

A. No, it wasn't. Part of the cobbles, to complete the dam, was to come from required borrow pit excavation. All rock larger than five inches in diameter was to be removed from materials placed in the embankment and came from borrow pit and was to go in to make up part of the cobble fill.

RXQ. 1218. In other words, there was some cobble borrow to be done yet? A. I don't quite get your question. I don't understand what you mean.

RXQ. 1219. Where were these cobbles to come from? A. They were—the cobbles were to come from required excavation, structure excavation and from plus-five-inch rock that was removed from materials brought in from the borrow pit and from the cobble borrow pit.

RXQ. 1220. At the end of the 1939 season, it is true is it not, that there was some cobble borrow work to be done? A. There were 50,000 yards 1734 shown in the specifications, item schedule, to come from cobble borrow pit.

RXQ. 1221. I believe that you testified that certain equipment had to practically be rebuilt when it came on the job, is that true? A. No, I said that a lot of it, tractors, that first came on the job were required to have complete overhauling.

RXQ. 1222. When was that done? A. Done in 1938.

RXQ. 1223. You weren't present in Panama, were you, at any time? A. I have never been—

RXQ. 1224. At the time work was done on that contract? A. I have never been to Panama.

RXQ. 1225. Do you know how the depreciation was figured in Defendant's Exhibit 17-R? A. All I know is what I read in this report. This report, Exhibit 17-R, it will be noted, on page eleven of Exhibit 17-R, that there is set up an original—that is under each item of equipment there is set up an original cost and then also added to that are additional or better, given, total costs which are taken as the initial value of the equipment.

In the next column is an amount set up as depreciation and the last column sets up sales returns. The amount as taken as depreciation, to the best of my knowledge, is the amount that this equipment was depreciated during the life of this job.

RXQ. 1226. Is that depreciation made on the same basis as the A.G.C. Schedule? A. Not at all. As I understand from reading this report, this total value of the equipment which includes the original cost plus the additional and betterment is taken and from that is subtracted what is set up here as sales return which was applied to the value at the end of the job and then a straight line depreciation was made over the months that the equipment was in operation.

RXQ. 1227. Do you know whether the rate of depreciation as used in Defendant's Exhibit 17-R, is greater or less than the percentages of depreciation used in the A.G.C. Schedule? A. I haven't checked that. Off hand I would say from a casual observation, as I understand this job extended over a period of twenty-one months. That is a little greater.

RXQ. 1228. A little greater? A. I haven't actually gone through and checked that.

Commissioner Evans: Is that Plaintiff's Exhibit 17-R?

Mr. Ruddiman: Defendant's Exhibit 17-R.

The Witness: Defendant's Exhibit 17-R.

1736

By Mr. Ruddiman:

RXQ. 1229. Generally speaking, would you say that the percentage rate for overhauling, major repairs and painting, as used in A.G.C. Schedule, should be in ratio to the percentage shown for depreciation in A.G.C. Schedule? A. I don't quite understand what you mean.

RXQ. 1230. Let me restate that question. Take, for example, the A.G.C. rate for a crane motor truck, five tons. That shows a percentage of 15% annual cost of overhauling, major repairs and painting, and a percentage of 25% for depreciation. Generally speaking, would you say that in actual experience these ratios would be practically the same as shown in the A.G.C. Schedule? A. No, I would say they would not. In other words, the— you mean for different items?

RXQ. 1231. For different items. A. In fact right here in that same column on that same page we have a motor truck, five ton, we have 25% depreciation and 15% for a major overhaul and repairs. Further down the line, take locomotive, 15% depreciation and 10% for overhaul and major repairs. They would vary with each item of equipment.

RXQ. 1232. Take a motor truck, five tons; would you say that in actual experience the ratio should be about 15 to 25? A. That depends on what you are talking about. For a motor crane, a  
1737 motor truck crane, that is what the A.G.C. sets up here for—



RXQ. 1233. Would you say in actual experience the ratio of overhaul to depreciation would be approximately the same? A. Well, now you are talking about one particular item of equipment, is that correct?

RXQ. 1234. Suppose we take a different piece of equipment? A. Let's take a 95-horsepower tractor; that's a D8 tractor that is involved.

RXQ. 1235. All right, we'll take that piece of equipment. What ratio does that show? A. 20% for depreciation and 15% for overhaul and major repairs; that is for the year. In other words, the depreciation is based on a five-year life, giving 20% for depreciation per year—20% of the capital valuation. Also allowed under average ownership expense is 15% of average ownership expense for overhaul and major repairs for the year.

RXQ. 1236. In various jobs, would you say that the ratio would be approximately 15% to 20% as indicated on that piece of equipment? A. Well, I presume that would be correct because that is based on contractor's experience, a contractors' manual. I might say that, maybe some other—let's take a shovel, for instance—might run something different from that. For instance, a crawler diesel 2½ cubic yard shovel, depreciation is 16% and 1738 the overhaul and major repairs are 15%.

RXQ. 1237. You would say— A. It is my understanding that this equipment is put out—this schedule is put out by Associated General

Contractors and is based on experience by contractors. No, I don't question its being approximately correct.

RXQ. 1238. I believe that you testified that you saw tractors stripped down to the frame, is that correct? A. I saw tractors in the Contractor's shop at times when they were making major repairs and completely overhauling equipment stripped clear down to the frame. Completely repaired them.

RXQ. 1239. Can you tell me what year that was that you saw them? A. I don't remember exactly. If I remember correctly it was through the winter of 1939 and 1940.

RXQ. 1240. Do you remember approximately when operations were begun in borrow pit number two in the spring of 1940? A. I can tell you exactly. You mean the excavation from the borrow pit, is that correct?

RXQ. 1241. That is correct. A. Excavation from borrow pit number two, in 1940, started on April 22, 1940.

RXQ. 1242. When was the first embankment placed during the spring of 1940? Do you remember? A. I believe I can tell you.

(The witness refers to a document.)

A. (Continuing) Embankment placing in 1940 started on March 28th.

Mr. Ruddiman: That's all.

Mr. Sweeney: One question, please.

# Redirect Examination on CLAIM No. 17

By Mr. Sweeney:

RDQ. 1243. Tell his Honor please, if you observed the size of the force that the Contractor used for maintenance work? A. The Contractor had, as I remember it, a two and a half ton truck fixed up as a repair truck that ran around over the job making repairs, that is, minor repairs for maintenance for all pieces of equipment. This truck was equipped with some tools and, I believe, it had an acetylene on it and in charge of a mechanic and, I believe, he had a helper. They circulated around over the job—one on each job. Circulated around over the job and made minor repairs to equipment. They not only covered the equipment that is a subject of this item of claim but covered the whole job; everything that was going on, with the possible exception of the screening plant. I believe that some of the labor that is included in the screening plant covers a man who was working at the screening plant and also took care of the maintenance there at the screening plant. In other words—

Mr. Ruddiman: I move to strike what he 1740 believes.

Commissioner Evans: Testify only to what you know and what you saw.

A. (Continuing) There was included in maintenance, shown under operation of the screening plant, one man that was in charge of the maintenance.

nance work; but this truck circulated around over the job and made minor repairs and maintenance on all other pieces of equipment. It was occasionally necessary to bring additional men or possibly more mechanics from the shops to assist in making some minor repairs and occasionally it was necessary to bring out an electric welding machine but, as a rule, that force took care of maintenance on the job.

RDQ. 1244. Now with respect to the time the job was completed and the equipment moved off, have you told His Honor what the condition of this equipment was at that time? A. I think I stated that to the best of my knowledge that the equipment that was moved out early in the year of 1941 was in good condition.

Mr. Sweeney: That's all, Your Honor, please.

Commissioner Evans: Anything more?

Recross Examination on CLAIM NO. 17

By Mr. Ruddiman:

RXQ. 1245. Do you know whether any of that equipment was overhauled during the winter of 1940-'41? A. I know that there was a lot of work going on in the Contractor's shops immediately after the embankment placing operations stopped; I think, on November 6th, 1940, and in preparation for, as I remember it the Contractor had already been awarded this job in Panama and he was getting some of the equipment



ready to go down there. I might say practically all of the equipment, major equipment, was moved out of the Vallecito job at the close of the season in 1940; only just a skeleton amount of equipment remained in there in consisting of one Lima 901 which is the one in the use, shovel later converted to a dragline and a few of these old worn out Euclid eight-yard trucks brought in from the Wolf Creek job in 1938 and possibly a couple of dozers and possibly one or two carryalls and some, I think, one sheepsfoot roller.

RXQ. 1246. Do you know whether any of the overhauling costs that were incurred after this job shut down in 1940 were charged to this job? A. Plaintiff's Exhibit 17-D shows, up in the title of it, that this was expenditures for the period of April to November 1940 inclusive. The placing of materials in the embankment was suspended on November 6th. A considerable amount of work was done in the shop during the remainder of that month. Whether they are included in here or not I don't know.

RXQ. 1247. It is true, is it not, that the 1742 government also kept costs on the work in borrow pit number two during 1940? A. We kept the costs, as I explained,—it is covered in this report which is fully explained in Exhibit 17-E. We kept costs on various features of the work, on the operations of the screening plant.

RXQ. 1248. Isn't it true that you kept a record of costs and hours on all the operations in borrow

pit number two? A. We kept—no; no, we didn't.  
Mr. Ruddiman: That's all.

Redirect Examination on CLAIM No. 17

By Mr. Sweeney:

RDQ. 1249. Refer, please, to Defendant's Exhibit 17-AA, and the item "Caterpillar Grader". Tell His Honor, with respect to that did you ever have occasion to rent that item of equipment from the Plaintiff? A. There were several occasions during, I think, the latter part of 1939 and possibly once during 1940.

RDQ. 1250. Tell His Honor the facts about that. A. That in doing some road work, force account work—that is, with government forces—we needed a "Teed Grader". We made arrangements with Mr. Stewart to rent this grader for a short period, I think some days maybe we used it two hours and maybe sometimes six hours and sometimes maybe a couple of days in a row and we agreed to a rental rate which had been formerly approved by the Contracting Officer of \$1.25 an hour for this equipment. It is shown in this schedule 1743 of equipment, Contractor's Schedule, at \$5.54.

Commissioner Evans: Anything further?

Mr. Ruddiman: That is all.

Commissioner Evans: I have one or two questions.

By Commissioner Evans:

RDQ. 1251. Referring again to Defendant's Exhibit 17-AA, to the column showing "Maintenance Hourly Rates of the Contractor," is it your understanding that the hourly rate there shown was computed on the basis of the costs spent for maintenance during the period of this operation or is that taken from costs extending over a further period of time? A. Well, I have no way—

RDQ. 1252. You don't know? A. I don't know definitely; the Contractor's Exhibit 17, where that period comes from—

Mr. Sweeney: 17-D states that that maintenance cost is for the period April to November 1940 inclusive and that was used to develop this maintenance rate on his Exhibit 17-E.

Commissioner Evans: Yes.

By Commissioner Evans:

RDQ. 1253. Now, referring to Defendant's Exhibit 17-BB, will you tell me again how you reached the conclusion that the percentages shown under "Major Repairs" were not included in the Contractor's maintenance charges? A. The major repair, if you will note by looking at Plaintiff's Exhibit 17-E, for instance, we can take an RD8 tractor. Under the RD8 tractor, set up under "Approximate Percent of Capital Value Per Month"—

RDQ. 1254. Wait till I find that RD8 tractor.

Which one is it? A. Sixth item down, "RD8 Caterpillar Tractor."

RDQ. 1255. RD8? A. RD8, yes, sir. You will note that there is a figure set up of 5.8%. Now going back to A.G.C. Schedule under "Expense per Working Month" we find there that a set up for "Expense Per Working Month" is 5.8% per month. Now this 5.8% per month is obtained by dividing the total ownership expense percent, which is forty-six, by eight. The average use months per year—

RDQ. 1256. And the 15 is part of the 46? Is that right? A. That is correct. And that is the same under all of these items that are listed under major repair. It is felt that probably this does include major repairs; we have no way of knowing under that maintenance.

By Mr. Sweeney:

RDQ. 1257. On the basis of your experience as an engineer, what would you say to that?

Mr. Ruddiman: I object to what he feels about this case.

Mr. Sweeney: Off the record, if Your Honor please.

Mr. Ruddiman: And move to strike that part of the answer.

1745 Commissioner Evans: Motion allowed.

Any questions on what I have asked?

Mr. Sweeney: That is all, if Your Honor please.

Mr. Haines, take the stand, please.



1746 **Jack A. Haines**, a witness produced on behalf of the defendant, having first been duly sworn by the Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination on CLAIM No. 17

By Mr. Sweeney:

Q. 1. Mr. Haines, please, for the record, will you state your full name? A. Jack A. Haines.

Q. 2. Your address, please. A. 1080 York Street.

Q. 3. You are an employee of the United States Bureau of Reclamation, Office of Chief Engineer, Denver, Colorado? A. I am.

Q. 4. Tell His Honor just what duties you perform, if any. A. I am employed in earth dam design section, where I supervise a group of engineers whose duty it is to review and interpret the terms and materials and investigations, laboratory tests, construction control reports, and the further duty to make periodic visits to the field to inspect earth dams under construction.

Q. 5. Tell His Honor please, just briefly, the facts regarding your educational background and  
1747 experience. A. I attended the University of California. I have been with the Bureau since 1934 and have been doing essentially the same type of work except for a period of one year while I was in the field as materials engineer on a dam under construction in Oregon. Since 1936 I have been in the Denver office in the capacity as previously named.

Q. 6. Now, please, in connection with the performance of your duties, do you have occasion to make field investigations in connection with the Bureau projects? A. Yes.

Q. 7. Tell His Honor, did you, at any time, have occasion to make such an investigation in connection with this job that is in issue here? A. I made a periodic inspection trip on June 27 and 28, 1940, to Vallecito Dam for the purpose of reviewing construction operations as related to design.

Q. 8. Now refer please to Mr. Walton's report in evidence as Defendant's Exhibit 17-E. Now tell His Honor, please, if at any time you had occasion to do anything in connection with that. A. On submission of this report to the Chief Engineer's office, I was given this report by my immediate superior, Mr. F. F. Smith and asked to review the report and make comments to him on it.

Mr. Ruddiman: I move to strike this evidence about what was done within the office of the Bureau of Reclamation.

Commissioner Evans: What is the purpose of this testimony, Mr. Sweeney?

1748 Mr. Sweeney: The purpose of this testimony, if Your Honor please, is to show, first, what that report reflected; what tentative propositions were submitted to the Contracting Officer on the basis of which he was enabled to make his equitable adjustment. The report that we are now following through, if Your Honor please, and showing step by step what was done preliminary to the is-

suance by the Contracting Officer order for Change Number Three whereby he allowed this equitable adjustment and we want Your Honor to know what the facts are, precise facts. We stated at the opening of our case that we would show that he was not only fair and just but that he was generous.

Mr. Ruddiman: If the Court please, the record in this case shows what the Contracting Officer did, how he made his determination, and I don't think it is any part of this case to say what he didn't do.

Commissioner Evans: Off the record a moment.

(Whereupon, there was unrecorded discussion.)

Commissioner Evans: Let the record show that the objection is overruled.

Mr. Ruddiman: May I have an exception to this part of the testimony?

Commissioner Evans: Yes, you may.

By Mr. Sweeney:

Q. 9. Tell His Honor what you did, please. A. I wrote this memorandum as mentioned before to my immediate supervisor, Mr. Smith.

1749. Q. 10. First, may I ask you, have you an independent recollection touching details of what you did without reference to your memorandum? A. No.

Mr. Sweeney: May he refer to the memorandum to refresh his memory touching these—

Commissioner Evans: You may refresh your recollection and tell us what you now remember about it.

(The witness refers to a document.)

A. (Continuing) From the evidence presented in Mr. Walton's memorandum, it was apparent, based on other Bureau of Reclamation jobs, that no extra payment appeared to be justified because of the fact that only 7% of the entire borrow area contained plus-five-inch cobbles by volume. Other Bureau of Reclamation jobs have been equal to or exceeded that, wherein no payment was made.

Mr. Ruddiman: I am going to object to what is done in other contracts. We don't know what the specifications provided or what the conditions were or anything. We'll be trying every Bureau of Reclamation lawsuit if we don't—

Commissioner Evans: Objection overruled.

By Mr. Sweeney:

Q. 11. Tell His Honor please, if the amount of cobble would cover, in borrow pit two, which you told His Honor was 7% by borrow pit volume, tell him whether or not that was an unusual condition, based upon your experience. A. From my 1750 experience with other Bureau Jobs, it was not an unusual condition.

Q. 12. Now, one more question, please. Referring to the field investigation you made in connection with this job, did you observe the actual conditions in pit number two in connection with your inspection trip? A. Yes, I visited borrow area number two.



Q. 13. Tell His Honor what you saw. A. During the visit, there was a long, open cut made, as I understand, for access roads, giving a fair cross section of the materials to be encountered and on the basis of that it did not appear to have an unusual amount of cobbles compared to other jobs where excavation was not provided for.

Mr. Sweeney: Take the witness, please.

Mr. Ruddiman: May I see the memorandum, please?

Mr. Sweeney: May Your Honor please, this memorandum is not an exhibit.

Mr. Ruddiman: I am entitled to see it if he is going to use it to refresh his recollection.

Mr. Sweeney: That is going beyond the scope of direct examination. There may be other matters in there. Of course we'll be glad to offer the memorandum as an exhibit if my friend will not make exceptions to it; I'll be glad to offer it as an exhibit, and then I won't—

Commissioner Evans: Off the record, please.

(Whereupon, there was unrecorded discussion.)

Cross Examination on CLAIM No. 17

Mr. Ruddiman:

Q. 14. What was the time that you made your visit to the Vallacito job? A. June 27th and 28th, 1940.

Q. 15. I understood you to talk about some other jobs by the Bureau of Reclamation and in that connection to say that there was no provision for screening, is that correct; where percentage of cobbles ran around seven percent? A. Seven percent or in excess, that's true.

Q. 16. There was no provision for screening? A. That is, the screening plant operations; there was a standing provision for the removal of plus-five-inch rock prior to rolling.

Q. 17. In those other jobs, did the contract contain any separate price for materials which had to be separated—which had to be screened? A. No.

Mr. Ruddiman: That's all.

Mr. Sweeney: That is all, Your Honor.

Commissioner Evans: Off the record.

(Whereupon there was unrecorded discussion.)

Commissioner Evans: On the record.

Mr. Sweeney: For the record, if Your Honor please, be it noted that in addition to the paragraphs of the specifications heretofore noted, paragraphs 10, Petition page 50 and paragraph 1752 28, Petition page 28 also pertains to this.

\* \* \* \* \*

1754 Will the reporter mark these documents please, for identification.

(The documents above referred to, marked "Defendant's Exhibit No. 21-A, 1 and 2," for Identification, are filed in connection with this case.)

(The documents above referred to, marked "Defendant's Exhibit No. 21-B, 1, 2, 3 and 4," for Identification, are filed in connection with this case.)

By Mr. Sweeney:

Q. 1260. I show you a document marked Defendant's Exhibit 21-A, pages one and two. Tell His Honor what it is. A. Defendant's Exhibit 21-A is a tabulation of data that I have made from load counts records showing the quantities of material excavated during the period covered by the claim.

Mr. Sweeney: It is now offered.

Cross Examination on CLAIM No. 21

By Mr. Ruddiman:

XQ. 1261. Where was the information obtained from that is shown on this exhibit? A. The information shown on this exhibit was from records of load counts similar to the ones that were given to the Plaintiff's attorney to examine in connection with claim number 1. The information that is on these was secured from the Contractor and shows the load count per day from the various operations. 1755

XQ. 1262. Are those records of load counts available to inspection by representatives of the Plaintiff? A. I don't think they are here. I think they are available in the files; I think they are available in the Bureau of Reclamation files. I made this up some time ago and I don't know exactly where they are now.

Mr. Ruddiman: No objection, subject to check.

Commissioner Evans: So received.

(The document above referred to, previously marked "Defendant's Exhibit No. 21-A, 1 and 2," for Identification, is now received in evidence and filed in connection with this case.)

Redirect Examination on CLAIM No. 21

By Mr. Sweeney:

RDQ. 1263. I show you a document which has been marked Defendant's Exhibit 21-B, consisting of four pages. Tell His Honor what it is? A. Take each one separately?

RDQ. 1264. No. With respect to document 21-B-1, tell His Honor what it is. A. This is a photograph taken on June 30, 1939, showing excavation being made in borrow pit number one of number three material. The silt and clay near the surface is being mixed in the excavating operation with the underlying gravel by taking a full-face cut.

\* \* \* \* \*

1776 RDQ. 1297. Have you ever made or know of there having been made any tabulation of actual production by equipment either under this equipment or similar equipment doing similar work which would show the normal productivity? A. I have here—I might explain that. This claim is based, apparently—and I guess that is true here by the statement shown in here—only in moving number two material. It will be noted that under



each of these statements, it shows that either the Lima dragline or the Lima shovel or the Lorain shovel worked so many hours and excavated so many cubic yards of number two material. So by that, I take it that this is during the period that the claim is for, is only for impervious material, that is, number two portion of the embankment; is that correct?

Mr. Leonard: I don't know.

A. (Continuing) That is the way it is stated here. I have prepared a tabulation of the data showing the average excavations at all times of material in barrow pit number one and I, during this same period, also show the average production of the dragline and shovel in borrow pit number two for the entire 1940 season.

By Commissioner Evans:

RDQ. 1298. That is based on a tabulation 1777 showing— A. How is that?

RDQ. 1299. Based on tabulation and records— A. Based on records; yes, sir.

Commissioner Evans: Off the record a moment.

(Whereupon there was unrecorded discussion.)

Commissioner Evans: On the record.

A. (Continuing) I have examined the government records in which the quantities excavated during each ten-day period from June 20, 1939 to October 20, 1939, which is just a slightly longer period than covered by the Contractor's claim—it was necessary to do this on account of this being

broken down by ten-day periods and have tabulated number two material—the yardage hauled while excavating number two material, the total loads hauled by excavating all types of material from borrow pit number one, and the cubic yards hauled in excavating all types of material from borrow pit number one for each the Lima dragline, Lima shovel and the Lorain shovel.

Over in the first column, under each of these pieces of excavating equipment, I have listed also the hours of operation per month; that is, those hours of operation cover three 10-day periods. The reason I did that was because those are grouped by months. Down at the bottom I arrive at a total cubic yards of excavating all types of material and a total number of hours of operation in excavating that quantity of material. By dividing the quantity by the number of hours, we arrive at an average quantity excavated per hour for each the Lima dragline, the Lima shovel and the Lorain shovel in excavating all types of material from borrow pit number one during the period covered by the Contractor's claim.

It will be noted by comparing the quantities at the bottom of this page, average quantities per hour, with the quantities that the Contractor has claimed is very inefficient due to being required to do mixing of materials, it will be noted that during this entire period, while excavating all types of material, both those covered by the claim and all other material coming from this pit, the Contractor ex-

cavated an average of 347 cubic yards per hour, while in its statement of claim it shows that excavating only the materials for which it is claiming additional compensation, to excavated 372 cubic yards per hour or approximately 28 cubic yards per hour more than the average for the whole operation of the pit. The same thing, going over to the Lima shovel, this tabulation shows that the Lima shovel, during the period it was operating in borrow pit number one between the dates as shown in the Contractor's claim, an average of 324 cubic yards of all types of material were excavated while the quantity excavated shown in the claim for which the Contractor claims was only 80% efficient was 321 cubic yards or approximately the same.

The Lorain shovel excavated an average, during this period, of all types of material, of 219 1779 cubic yards, while shown in the Contractor's claim for which the claim is only 77% efficient, the Contractor shows the shovel excavating 231 cubic yards per hour or approximately twelve yards per hour more than is shown for the average of all types of material.

Commissioner Evans: That is all types, as shown in each of those columns, does that include number two material?

The Witness: That includes number two material. It was impossible for me to break these down. It takes in number two, three, everything taken out of the pit during that period.

By Commissioner Evans:

RDQ. 1300. Does the Contractor's claim relate to number two material specifically? A. Specifically number two. That is where this alleged extra mixing was required of the Contractor.

RDQ. 1301. You don't have any figures to show the hours in which the dragline and the two shovels were engaged in taking number two material only?

A. Well, I presume the number of hours that the Contractor shows here. I had nothing to check that by but they covered the hours that it was taking only number two material. For instance, on the Lima dragline, it shows here, the Contractor indicates under Lima dragline 1,057 hours as compared with the 1,488 hours that I show. On that basis, I would say that 400 hours of this was excavating other types of material other than number 1780 two.

RDQ. 1302. Wouldn't that make a vast difference in your average if you divide—take under the dragline — 360,216 cubic yards by 1,057 hours, you would have a lower cubic yard content than you have here, wouldn't you? A. Well, that is exactly what the Contractor has done, I presume, in its statement of claim. It is taking, for instance, under the Lima dragline, instead of showing 360,000 as the government shows in its report, the Contractor shows it excavating 362,000 yards and it has divided that by 1,057 hours. Our records show, during the same period, that only 360,000 cubic



yards of number two material was excavated. In other words, there is a discrepancy of 30,000 yards and, however, the period I am covering is a few days longer than was the Contractor, because of it being broken down in ten-day periods.

Commissioner Evans: All right, go ahead.

A. (Continuing) On all excavation that was made in borrow pit number two during 1940 was made with the Lima dragline and the Lima shovel. Taking the actual calculated yardage, total excavation, from the final statement that was excavated from borrow pit number two during 1940 it amounted to 846,891 cubic yards.

These two machines worked in the pit 3,466 hours. That is not broken down. I have just lumped the two together because it is impossible to say how many of that 846,000 yards was excavated by one machine and how many by the other; but the average production for those two machines in excavating the material from borrow pit number 1781 two for the entire year 1940 was 244 cubic yards per hour—considerably less than the Contractor shows as being only 80% efficiency for the other operation during this period.

Mr. Wunderlich stated in his testimony in the hearing before this Court of Claims the rates used in claim number 21 included the cost of operation of the machine and the labor for the operation. It is impossible, from government records, to check this; that is, check the hours of operation in do-

ing this particular work because there is nothing here outlining exactly where the work was performed and we don't have a breakdown where we can exactly check that.

The items of equipment, in addition to including the excavating equipment, include this so-called efficiency factor has been applied to, includes all equipment that was working with or from that particular piece of excavating equipment.

The hourly rates as shown in the Contractor's claim, less the labor cost—that is, taking off the cost of the operator from each—are greatly in excess of the equitable rates as computed by the government under claim item number 17 and also are considerably in excess of the rates as claimed by the Contractor under claim item number 17, as reflected by Plaintiff's Exhibit 17-E.

RDQ. 1303. Plaintiff's Exhibit 17-E? A. Plaintiff's, yes, sir. Government records show that 1782 the total embankment placed during each month of the period that is covered by this claim was the highest that it was during any like period during the entire 1938, 1939 or 1940 construction seasons, periods during which embankment was being placed in the dam.

The least amount placed in any one month during this period of operation was approximately 201 cubic yards and during one month there was approximately 310 cubic yards placed. This was the maximum that was placed in the embankment in any one month during the entire job.

In the testimony given for the Plaintiff by Mr. Stewart, Contractor's superintendent, he stated that the Contractor was required to mix materials coming from borrow pit number one during 1939 and that this was not required for excavation made in 1938 and 1940. When stratified materials such as these were being excavated during 1938 and 1940 the same requirements were required by the government inspectors. However, I might say that during most of 1938 and a good portion of 1939—1940, not 1939—the materials excavated from borrow pit number one did not consist of strata of sand, gravel, and silt and clay but consisted solely of silt and clay which is a homogeneous material and did not require any mixing. This was only necessary where we had this deepest part of the cut in sand and gravel, the lower portion was, and the top portion was in silt and clay. However, wherever the Contractor did encounter this type of material, it was required that the materials be excavated such that they were properly mixed as to gradation. It also was the practice of the shovel operators, when operating in borrow pit number two during 1940, to pass the open bucket of the shovel up through the face of the cut between periods of loading out trucks, if there was not a truck standing there waiting. This was the same practice that was carried on in borrow pit number one in which it was very desirable to give a better gradation of the materials.

By Mr. Sweeney:

RDQ. 1304. Tell His Honor in respect to that point, would it have been possible for the Contractor to have obtained an acceptable gradation of the materials using only the drag line? A. Well, it wasn't—the operation of the dragline wasn't as satisfactory in excavating stratified materials. In most of the operations in borrow pit number one, the dragline or, I'd say in excavating the greater portion of borrow pit number one, the dragline was excavating only silt and clay that went into the downstream portion of the number two zone and it made no particular difference. The Contractor was allowed then to excavate if they wanted to take off the top portion of material and later drop down and take off the bottom portion of that, it was all right because the materials were homogeneous and there was no difference in gradation of them as we went deeper.

I might say, during the period of this claim, the dragline, as shown by Defendant's Exhibit 21-A, excavated a total of 516,540 cubic yards of 1784 material from borrow pit number one while the Lima shovel only excavated 262,274 cubic yards and the Lorain shovel excavated only 117,896 cubic yards. Thus, the dragline excavated more material than both the other machines put together. In other words, the greater portion of the excavation was made with the dragline.



RDQ. 1305. Tell His Honor, please, if the shovel had been used to accomplish these operations what would have been the result as compared with the operation of the dragline so far as the alleged extra expense is concerned. A. There would have been none. Although the Contractor does include shovels in his statement of claim, I can't see where the amount of passing the open bucket up through the face of the cut, that was done in this pit, slowed down the operations because that was usually done between times while one truck was pulling away and the next one was pulling in or maybe there wasn't a truck right there.

RDQ. 1306. Now, with respect to this alleged loss of efficiency, in what way, if any, would that have been affected by such factors as weather conditions, type of materials, access roads, routing of trucks and so forth? A. This loss of efficiency would definitely have been affected by weather conditions, condition of haul roads, various other factors such as the type of materials being excavated

and so forth. The greatest thing here is the method that the Contractor has used in computing this efficiency. In other words, any operation can not be expected to average what the peak day's operation is, I don't care whether it is excavation or what it is. There is going to be some days when operations are going to be much more satisfactory than they are other days. If every day averaged the peak, why, you would have no peak.

RDQ. 1307. Now, with respect, please to this 100% factor of capacity, was that affected in any way by the quantity of equipment the Contractor had on the job or would it have been affected? A. The amount of equipment he had?

● RDQ. 1308. Yes. A. Yes, if the Contractor had more trucks—well, I can say this, that possibly some days a truck was laid up or a piece of excavating equipment might have been delayed or slowed up due to not having such trucks hauling from it while another day that Contractor had ample trucks maybe, due to other factors on the job there they could keep trucks shoved up to the dragline naturally the excavation would be higher than it was on some of the other days when there wasn't sufficient trucks operating.

RDQ. 1309. What would be the affect if he had too much equipment on the job? A. Well, the equipment would be standing idle and it seems to me, in trying to make it an efficient operation, he would jerk it off and put it some place else.

1786 RDQ. 1310. Now, in regard to photographs offered as Defendant's Exhibit 21-B, four pages; have you explained to His Honor all the facts that are necessary touching this claim? A. Photograph, Defendant's Exhibit 21-B-4, shows both the shovel and a dragline excavating in borrow pit number one during the period that is covered by this claim.

Commissioner Evans: Mr. Walton, you have covered those photographs pretty well. Limit your

statements to anything illustrative of any testimony you have given since they were put in.

A. (Continuing) The dragline shown in this picture is taking a cut of materials that are unstratified; consist solely of silt and clay; while the shovel is excavating stratified materials.

The same thing is true in Exhibit 21-B-3.

The photograph, 21-B-2, shows what I have illustrated here just now, that the clay and silt, over gravel and sand, has a tendency to stand there and not break down like the sand and gravel does.

The photograph contained in Exhibit 21-B-1 shows a typical operation of a dragline excavating from the bottom of the pit; in this case he is excavating to the water table.

Mr. Sweeney: That's all, Your Honor.

Mr. Ruddiman: Before you proceed, reference was made sometime ago to a tabulation showing the production of machines generally, based on computations. Which exhibit is that?

1787 Mr. Sweeney: That was 21-A.

Commissioner Evans: 21-A.

The Witness: The total excavation in borrow pit number 2? It is 21-A-2.

Commissioner Evans: Yes. For the whole year 1940?

The Witness: The whole year of 1940 in borrow pit number two. That is on the opposite side of the river from borrow pit that this claim involves in that it is merely shown as a comparison of what was done in that whole season and that material

is from actual calculated yardage and the operation of those two machines have been accurately kept during that period.

Recross Examination on CLAIM No. 21

By Mr. Ruddiman:

RXQ. 1311. What about the difference of material in borrow pit one and two? A. The excavation of material from borrow pit one would have been higher than from borrow pit two.

\* \* \* \* \*

1792 RXQ. 1329. After making this groove, wouldn't he have to widen it to the full face of the cut, say fifteen feet? A. Widen it as he made his excavation, yes; as he loaded it into trucks and made excavations and loaded it out.

RXQ. 1330. On this job, Mr. Walton, wouldn't you expect to get your greatest rate of production during the year 1939—production of materials placed in the embankment? A. Well, I think, yes—I would say that we did get the greatest there.

RXQ. 1331. You would expect to, would you not, under the plan of operation involved in this case? A. Well, I would say that the production of the materials from borrow pit number one was more rapid than it was in borrow pit two.

RXQ. 1332. Also more rapid than the required excavation, was it not? A. A great deal of the required excavation being made in 1939, yes; it was more rapid than the required excavation. It was easier digging.



RXQ. 1333. And there was more required excavation, I take it, in 1938 than there was in 1793 1939? A. No, I believe there was more in 1939. The bulk of the spillways was excavated in 1939—the bulk of the yardage out of the spillway.

RXQ. 1334. I take it the ratio of borrow to required excavation was greater in 1939 than it was in 1938? A. Yes, and it was greater in 1940 than it was in 1939.

RXQ. 1335. In 1940 most of your excavation came out of borrow pit number two, is that correct? A. No, it came out of borrow pit number one and borrow pit number two. In the total job, there was approximately two and a half million yards excavated from borrow pit one and one million yards from borrow pit number two. Approximately 850,000 yards of excavation from borrow pit number two was made in 1940. If you want them, I can give you the exact figures that were taken. I don't have here the exact yardage taken from borrow pit one during 1939 or during 1940. I have got the total excavated from the pit but you don't have it broken down.

RXQ. 1336. More than 850,000? A. I think it would have been a little less.

RXQ. 1337. It does make a difference then as to where you are working as to what your production rate is? A. It makes a difference; there is a lot of things that come in—

RXQ. 1338. Will you answer the question 1794 first? A. Lets have the question again.

(Whereupon the last above question was read.)

A. Yes, I would say it would.

RXQ. 1339. If a truck is delayed while it is waiting at the shovel or dragline to be loaded, doesn't that truck suffer a loss of efficiency as far as production is concerned? A. I will have to qualify that to answer it. I would say, if the truck is delayed it would naturally slow down production. However, if the truck is delayed and this is an operation that is going on all the time, the Contractor should reduce the number of trucks that is under the shovel so that the truck isn't delayed.

RXQ. 1340. Would you say that the materials excavated at borrow pit number one during the period covered by this claim were difficult to excavate? A. During the period—

RXQ. 1341. Of Claim 21? A. Oh, I would say they were average for the whole operation of borrow pit number one. They were about average.

RXQ. 1342. Get about average production for earth excavation? A. About average production. Get higher production from borrow pit number one than you would from borrow pit number two.

Mr. Ruddiman: That's all.

\* \* \* \* \*

2197 Charles A. Burns, a witness produced on behalf of the defendant, having first been duly sworn by Justice Madden, was examined, and in answer to interrogatories, testified as follows:

2198 Direct Examination

By Mr. Sweeney:

Q. 1. Mr. Burns, for the record, will you, state your full name. A. Charles A. Burns.

Q. 2. And your address? A. Denton, Texas.

Q. 3. Now, will you indicate, please, for the record, your experience either in private business and the government and so forth and then your present business? A. I entered the— Well, before entering the government service, I was assistant engineer with the Santa Fe in construction work. I entered the government service in 1913. In 1919, I was appointed construction engineer at Elephant Butte Dam.

In 1922 I left the government service and went with the El Paso Bitulithic Company as general superintendent in charge of all their operations out of El Paso.

In about 1924, I believe, I went back with the government in the Indian Service, and in 1925, I visited the Pine River Dam site for the Indian Service and about that time I was appointed assistant supervising engineer in the Albuquerque office for the Indians.

I think it was in '35 when the appropriation was made for the Pine River Dam. I again transferred back to the Bureau of Reclamation as construction engineer.

In '41 I entered the Army as a Major in the Engineers and was assigned as Regional District Engineer for the Hobbs District, which comprised seven large air fields under construction and later was assigned to McCloskey General Hospital; and let's see, I was discharged from the Army in April, must have been '45, and entered business for myself as air conditioning, and in the meantime I have a plant where I build hospital beds, a bed that I developed when I was in the Army, for special treatment of patients that do not have good circulation in the body.

Q. 4. That is the Burns Mechanical Circulator?

A. Yes, sir. It has been on the market for over a year.

By Justice Madden:

Q. 5. Where is that plant? A. At Denton.

By Mr. Sweeney:

Q. 6. Now, Mr. Burns, with respect to this job, that is, the Pine River job, and the construction of the dam, you were the construction engineer? A. That is right.

Q. 7. Will you outline briefly just what duties you performed on that job and your relation to the contracting officer? A. Well, the duties of a construction engineer is head of an organization in



which we have a chief clerk, office engineer, 2200 field engineer, a man in charge of the laboratory, and various other heads as necessary; and it is more of a coordinating job, and I would say that as construction engineer, you are a representative of the contracting officer.

Q. 8. Now, with respect to this job, tell us who was the contracting officer. A. Mr. S. O. Harper, Chief Engineer.

By Justice Madden:

Q. 9. I didn't hear that title. A. Mr. Harper, S. O. Harper, Chief Engineer.

Q. 10. Chief Engineer of what? A. Bureau of Reclamation.

Mr. Sweeney: And for your information, please, ~~Mr. Harper~~ was the contracting officer who signed on behalf of the Bureau.

By Mr. Sweeney:

Q. 11. Now, please, Mr. Burns, with respect to claims for extra work arising under this contract or any similar contract, in your capacity as construction engineer, what did you do with respect to such claims for extra work? A. They were all referred to the Denver Office for consideration and they have a special section in the Denver office that handles extra work orders, and then, of course, if they were prepared there and sent to the field for further information and sometimes back and forth, maybe a time or two, but finally it was referred into

the Denver office and finally came out of 2201 there with full instructions as to what to do with them.

Q. 12. Now, as in the case that we have before us, when the job is finished and a contractor is making claims for extra work, can you tell His Honor just a little more detail about what you do with respect to such matters, just how far your authority goes?

A. Well, when the job is finished, we might say a final report is made and in that must be compiled the claims and some recommendations on what should be done with them and sent to the Denver office for the particular sections that work directly under the chief, to make the final analysis of them and preparation—we might say, that is what I mean by analysis, they make the final preparation and disposition.

Q. 13. Now, please, we show you a document marked Defendant's Exhibit P consisting of seven pages. Tell His Honor what it is, please.

Justice Madden: That is already in evidence?

Mr. Sweeney: No, Your Honor, we are having it marked and we will offer it. This is a new one.

(The document above referred to was marked Defendant's Exhibit P for identification as requested.)

A. This is a letter from the construction engineer, Vallecito Dam, to the chief engineer, and refers to: Claims Martin Wunderlich Company

and— You don't want to go into too much detail with it.

2202 Q. 14. Just tell His Honor what it is. A. It refers to Item 5 of the claim and there is attached to it—

Q. 15. Give His Honor the date, please? A. April 2, 1940.

Q. 16. Is that your signature thereon? A. This is my signature.

Q. 17. It is your letter? A. Yes, my signature.

Q. 18. Just in a little more detail describe what the attachments are, if they are referred to in the first paragraph? A. Yes. Attached to Mr. Wunderlich's letter was a revised submission of claims. I am reading paragraph 3. I think that probably I'd have to—

Q. 19. Just read it into the record. A. I'd have to read it. I will read paragraph 3. I am not entirely familiar— “Attached to Mr. Wunderlich's letter was a revised submission of claims. Reports will be prepared on each item and forwarded as rapidly as they can be assembled. There are many misstatements in Mr. Wunderlich's—

Mr. Ruddiman: I am going to object to the reading of this inter-office communication into the record here.

Mr. Sweeney: Your Honor, he is describing what it is and plaintiff is submitting to him his claims and then in due course Mr. Burns, as construction

2203 engineer, of course, is forwarding that to Mr. Harper. This is one of these inter, not one of the intra-office communications; it is from a subordinate to a superior.

Justice Madden: I take it that Mr. Burns is restating now under oath what he said there and you will have an opportunity to cross examine him about it.

Mr. Sweeney: Yes, sir.

Justice Madden: Objection overruled.

A. (Continuing reading) "all of which will be answered in our discussion of his claims."

There is attached a letter from Mr. Wunderlich to Mr. C. A. Burns, Construction Engineer, dated March 25, 1940, which in turn deals with Claim No. 5. I also notice there is a letter from Mr. C. A. Burns, Construction Engineer, to Mr. Wunderlich dated February 26, 1940, which in turn deals with the letter of March 25th. This letter brings out the fact I did discuss Claim 5 with Mr. Wunderlich and in adding up the figures in Claim 5, I included an item of \$1,007.00 twice and that is what this letter refers to.

I wrote to Martin and told him I had made an error. That is what this refers to and I said in there: "I regret that this error was not found when we were discussing this claim and would appreciate your giving me your views."

In other words, when I was discussing it, I added in one item twice in there and that is what this item here refers to.



2204 Then there is a— I don't think this memorandum of conference is attached to this. I don't think it was part of this letter. I sent him.

Mr. Sweeney: The document is now entered.

A. (Continuing) That is an office memorandum. I don't believe that was attached to the letter.

Justice Madden: Does it still have seven pages?

Mr. Sweeney: Three pages, if Your Honor please; now it is three pages.

Pardon me. I think it does relate to it because it is the plaintiff's. We are going to— This is the plaintiff's here. Yes, that is attached to it.

Mr. Ruddiman: This is supposed to be an exhibit, too?

Mr. Sweeney: That is part of the seven pages that were originally offered.

Justice Madden: We are seven again?

By Mr. Ruddiman:

Q. 20. Your letter to the construction engineer, I take it, was prepared after the work had been performed on Item 5, is that correct?

Mr. Sweeney: May Your Honor please, what letter is the counsel referring to? It is dated. He knows whether the job is finished.

By Mr. Ruddiman:

Q. 21. Your letter of April 2, 1940?

2205

By Justice Madden:

Q. 22. When was the work finished? A. Well, now, I'd have to just—

Mr. Sweeney : Fall of 1941.

A. (Continuing) You are referring to Claim 5?

By Mr. Ruddiman:

Q. 23. Yes. A. I think that is true. I think this is after the work was finished. I believe that is true.

By Justice Madden:

Q. 24. You mean after the work involved in Claim 5? A. I am sure, because we wouldn't have been trying to arrive at the price if the work hadn't been finished. I am sure that is correct. I am sure counsel is correct on that. It was after the work was finished.

Mr. Ruddiman: I am going to object to this exhibit as proof of the facts stated in the letter from the chief engineer to the construction engineer.

Justice Madden: Well, I think it is not valid as such proof. Here you have a chief engineer on the stand and I think whatever the facts are, he ought to—

Mr. Sweeney: Construction engineer, Your Honor. During the course of the work he is communicating to the chief engineer certain facts and information regarding the claim on the basis of which

the chief acts. It is one of these kind of communications the Supreme Court refers to in

2206 McCoy versus The United States, 193. They are written during the job and they are written from the subordinate to a superior, on the basis of which the superior officer makes his decisions; and

in the Rosser case, in No. 46, our Court of Claims said that such documents are admissible; in fact, that the whole case could be presented, that is, the whole case so far as the defense was concerned, could be presented to the Court on the basis of such documents.

Justice Madden: I think these documents are admissible for the purpose of showing that the construction engineer communicated certain information to the chief engineer.

Mr. Sweeney: And in turn, if Your Honor please, the contractor is submitting his claims to Mr. Burns; Mr. Burns is reviewing them, submitting his recommendations to the chief engineer in Denver, on the basis of which the chief engineer and the contracting officer ultimately makes his decision regarding the particular claim.

Justice Madden: It certainly is evidence of the fact that the construction engineer did submit these claims and that the chief engineer made his response, whatever it was, to them.

Mr. Sweeney: That is what it is offered for, Your Honor.

Justice Madden: It may be admitted.

(The document above referred to, previously marked Defendant's Exhibit P for identification, is now received in evidence and filed in connection with this case.)

Mr. Ruddiman: Do I understand, Your Honor, it is not admitted as proof of the facts stated in the letter?

Justice Madden: No, I should think it is not proof. I mean, so far as the facts stated by the construction engineer in his letter, he ought either to testify independently about them or at least under oath adopt these statements as his present testimony.

By Mr. Sweeney:

Q. 25. Now, with regard to this document, Mr. Burns, please, the memorandum attached to it, pages 4 to 7, inclusive, is that the memorandum referred to in paragraph 3 of your letter to the chief engineer? A. It is.

\* \* \* \* \*

2212 Q. 41. Tell His Honor, please, are those facts set out in the equipment rental rate of the Bureau which is in evidence on behalf of both sides, and I think it is Defendant's Exhibit— A. Yes, this is the rental rates we used as the basis for whatever claims fell under this at the dam.

Q. 42. For the record, please, will you just make clear to the Court what you are referring to, what is the Bureau rates for what year? A. Well, this is published, this particular one we used, was published January 2, 1940.

Q. 43. Now, the job began in 19— When was it, '37 or '38? A. '37.

Well, now, I don't think there was any rate on the job at the beginning. We may have had something, but I don't recall any right in there.

Q. 45. Now, tell His Honor, please, if the 1940 rates are a revision of the 1937 rates? Does it show



on its face? A. Yes, this schedule supersedes the schedule issued by this office under date of September 1, 1937. That would be—the first one came out about '37.

Q. 46. So as we understand it, the Bureau rates promulgated are the rates that would guide you in making recommendations? A. That is right. We had no recommendation in that whatever. That is established by the Denver office.

2213 Q. 47. Now, please, we show you a document marked Defendant's Exhibit Q. Tell His Honor what it is, please.

(The document above referred to was marked Defendant's Exhibit Q for identification as requested.)

A. Letter dated Vallecito, Colorado, April 30, 1941, from the construction engineer to the chief engineer. The subject is: Claim for adjustment under Order for Changes No. 3, Vallecito Dam, Pine River Project, Colorado.

Q. 48. Just refer, please, to pages 2 and 3 and just give the substance of just what you—of the purpose of that letter, what it relates to? A. It relates to the transmitting to Martin Wunderlich Company of Jefferson City, Missouri, Order for Changes No. 3, dated August 31, 1940. "Order for Changes No. 3, among other things, provided that Any claim for adjustment in the amount due under the contract by reason of the changes shall be stated and filed with the contracting officer within 90 days

from the date of this order unless the contracting officer shall, for proper cause, extend such time. Under date of November 22, 1940, the contractor requested an extension of 30 days. Under date of November 25, 1940, the Chief Engineer granted such an extension."

Q. 49. It won't be necessary to read all the letter, please, Mr. Burns, but in that letter do you refer to this issue of rental rates that has been made so prominent in this case, that is, equipment rental rates? A. On page 2, paragraph 5, quote, "Under date of April 17, 1941, your office furnished us a tabulation of equipment rental rates to be used in checking the contractor's claim. While the Martin Wunderlich Company stated in their letter of January 11, 1941, that their rental rates were in accordance with the A. G. C. rates, it will be noted that the rates they used are considerably higher than the rates furnished us by your office. The attached tables have been prepared for the purpose of comparing cost using the hours of labor and equipment as shown on the schedule submitted by the Martin Wunderlich Company, the rental rates per hour as computed by the Bureau of Reclamation, and the rental rates per hour as used by the Martin Wunderlich Company. It will be noted that the total for equipment rental based on the Bureau's rental rates is about one-half of the amount as computed by the rates used by the Martin Wunderlich Company."

There is three pages of this, of course.

Q. 50. And in that letter you make your recommendations to Mr. Harper, the contracting officer, with regard to the claims? A. Yes, sir.

Mr. Sweeney: Now this document, if Your Honor please, is offered as Defendant's Exhibit Q subject to verification. It is a copy.

2215 • Mr. Ruddiman: I have no objection to the admission of this letter merely to show that such a letter was sent by the construction engineer to the chief engineer, but I would object to it as proof of any facts stated therein.

I have one further objection, that I think the letter is already in evidence.

Mr. Sweeney: That is possible and I have tried to check, if Your Honor please. I did before I left Washington, but I was so busy on other cases— It is possible it was in evidence. I am not positive of that.

The purpose of this document and this chain of evidence is to refute plaintiff's contention that he entered into an alleged agreement with Mr. Burns regarding rental rates because Mr. Burns during the actual progress of the work, is informing his superior in Denver, the contracting officer, that the rates that are being used by the plaintiff are perhaps a hundred per cent over the so-called Associated General Contractors rates.

Justice Madden: It may be admitted.

(The document above referred to, previously marked Defendant's Exhibit Q for identification, is now received in evidence and filed in connection with this case.)

Mr. Sweeney : Please mark this R.

(The document above referred to was marked Defendant's Exhibit R for identification, as 2216 requested.)

By Mr. Sweeney :

Q. 51. We show you a document marked Defendant's Exhibit R. What is it? A. Letter dated May 22, 1940, Denver, Colorado, from the Acting Chief Engineer to the Construction Engineer, Vallecito, Colorado. The subject is: "Claims of the contractor for adjustments in price of excavation in earth borrow pit on left side of river—Vallecito Dam—Pine River Project." This letter, I'd say, comprises three pages.

Q. 52. Do you identify Mr. Harper's signature thereon? A. Yes, that is Mr. Harper's signature.

Q. 53. Tell His Honor, please, if this letter contains the instructions from Mr. Harper to you regarding his efforts to arrive at an equitable adjustment of this claim under contract? A. It goes on to state: "Mr. Martin Wunderlich visited this office on Thursday, Friday, and Saturday of last week, and discussed at length with the engineers of the office the problems of the separation of the cobbles from the earth fill material in borrow pit No. 2, now being worked,—" I believe that covers that, doesn't it?

Q. 54. Yes, that is sufficient, and then tell His Honor, please, does he indicate to you just the procedure that would be followed by you in making your recommendations and in calculating what ad-



ditional costs, if any, would be allowed? A. 2217 Well, I am going to read just a part of this to sort of get it clear in everybody's mind, part of paragraph 4. I'd say the last sentence of paragraph 4 shows it clearly, after this discussion in Denver by the engineers with Mr. Wunderlich's representatives.

“Finally, after much discussion, during which no agreement could be reached, Mr. Wunderlich made a final verbal proposition, which is understood to be as follows:”

Then these are Mr. Wunderlich's suggestions, I believe.

Q. 55. Now refer, please, to the last sentence of paragraph (d) where it says: “In figuring these costs, our monthly rental schedule for equipment will apply.” Now, with respect to that, tell His Honor, please, did you at any time while you were the construction engineer on this job use any other figures than those that were authorized by the Bureau? A. No, there were none other used.

Q. 56. Could you have done such a thing, Mr. Burns? A. No, because our recommendation would have to go into Denver and of course they would use this schedule of rental rates regardless of what we used. If we used any schedule other than that authorized, it would be disallowed in any event.

Q. 57. Referring please to the equipment rental rates promulgated by the Bureau sometime back in 1937 which they state on their face followed the A. G. C. rates? A. Yes.

2218 Mr. Sweeney: This document is now offered, if Your Honor please.

By Mr. Ruddiman:

Q. 58. What is the final adjustment by the Bureau on this claim made on the basis indicated in this letter of May 22nd from the acting chief engineer to you? A. I believe you are referring—I will go a little further, just in passing, so it might clear up your point. We kept time and Mr. Wunderlich kept time. We were all in accord, so we accepted his time. Is that one of the points you want to bring out? Now, then, the rental rates were those referred to in here, are in that book, are the ones we used. Is that the point?

Two things were involved, time and rates, in computing the final cost. We were all in accord on the time. There was no difference of opinion on that at all. Mr. Wunderlich's time corresponded with ours in a matter of hours; nothing at all. The rates were those compiled by the Bureau. Is that correct?

Q. 59. Do I understand from your testimony then, that in making the adjustment for the cobble borrow claim, you followed the basis set out in these instructions? A. Well, now, let's see. I pointed out here—Now, this may be a slight—I was just saying now, I didn't want to confuse this in here because some of this statement is just what was talked of verbally in Denver.

2219 Now, then, when it comes down to this part here, in figuring the cost, our monthly

rental schedule for equipment applied. Yes, absolutely, that is what we used.

By Mr. Sweeney:

Q. 60. Please tell His Honor where these rates were fixed? A. They were fixed in Denver in that rental schedule that was admitted in evidence.

Mr. Sweeney: That equipment schedule, if Your Honor please, is in evidence by both sides.

A. (Continuing) Yes, that is true; that is what we used.

By Mr. Sweeney:

Q. 61. Tell His Honor if the computations prepared in the Denver office, so far as you know, also have been submitted to the contractor? A. I believe they were submitted in an extra work order. I have just forgot the number of the work order, but they were all submitted as an extra work order to the contractor.

Mr. Sweeney: Your Honor, just a few material issues in this whole law suit—we have gone into the details heretofore—just these two major points we are covering today.

By Mr. Ruddiman:

Q. 62. Well, isn't it true that this letter discusses an offer which was made by Mr. Wunderlich and which was never accepted by the  
2220 government? A. Well, that is why I say there are several things involved in that

letter. You have to pick out those things that are pertinent only. It is rather involved except as to the pertinent points.

Mr. Sweeney: If we may show it in the proceeding, the record shows, if your Honor please, that Mr. Wunderlich's offer was not accepted. That is one of the reasons we are here now, why we are here.

Mr. Ruddiman: I am going to object to this exhibit here. It discusses certain negotiations. It is written by Mr. Harper. I don't see that it is material to anything involved in this case.

Mr. Sweeney: Your Honor, then we will have to go to San Francisco. I have done my utmost to avoid that—go for no other purpose than to have Mr. Harper identify his signature and state the facts that are in that letter.

Justice Madden: What is it you think is relevant; just the statement about these rental rates?

Mr. Sweeney: That is all we are relying on now, Your Honor, to show the claim as presented by Mr. Wunderlich to Mr. Harper, the contracting officer. Mr. Harper in turn is informing his construction engineer what has occurred and then he is indicating to him, particularly on page 2, the basis of Mr. Wunderlich's claim, and then is telling him that in computing the claims, the rental rates follow the Bureau's equipment rental 2221 rates. That is all I am offering it for.

Justice Madden: You don't think the letter is admissible to conclude Mr. Wunderlich with



regard to any of these terms that he may have made?

Mr. Sweeney: No, absolutely not. Mr. Harper may have misunderstood what he said. I had an occasion like that—

Justice Madden: What do you say?

Mr. Ruddiman: I have no objection if it is admitted with the understanding it is not admitted for proof of the facts stated in the letter.

Justice Madden: It may be admitted.

(The document above referred to previously marked Defendant's Exhibit R for identification, is now received in evidence and filed in connection with this case.)

Mr. Sweeney: Please mark this Defendant's Exhibit S.

(The document above referred to was marked Defendant's Exhibit S for identification as requested.)

By Mr. Sweeney:

Q. 63. Now we show you a document marked Defendant's Exhibit S. Tell His Honor what it is and indicate the date of the letter, and that you signed it. A. It is dated Vallecito, Colorado, February 17, 1941, from the construction engineer to the chief engineer. The subject is: "Preliminary Report—Claim for adjustment under order 2222 for changes No. 3 — Vallecito Dam, Pine River Project, Colorado." You want to—

Q. 64. Just briefly tell His Honor what it is. Don't read it; just the substance of it. A. I am just trying to get the substance of it here. Mr. Wunderlich is returning order for changes No. 3. We have prepared a report of the contractor's operations in Borrow Pit No. 2. Our report that we submitted—I am going to just read a sentence here. "Our report approaches the costs at an angle entirely different from that of the contractor, in that the contractor's costs are for the complete operation of Borrow Pit No. 2, while our report deals only with the cost involved in the separation of the materials."

Q. 65. Now refer, please, to paragraph 4 on page 2 and to that part of the paragraph which says "our results would be as follows:" and refer to the fact "the equipment rates used by the contractor are about one hundred percent over the proper A.G.C. rates." Now, do you recollect that? A. Something of that nature in here. Yes, here it is on page 2, under paragraph 4. I will just read the entire paragraph. Then it will clear it so everybody will be clear on it.

"For convenience we will assume that the labor items, insurance and taxes, and dynamite and supplies are correct, using the contractor's figures for these items and his hours shown for equipment, our results would be as follows: the equipment rates used by the contractor are about one hundred percent over the proper A.G.C. rates."

Mr. Sweeney: This letter is now offered, if Your Honor please, as part of a chain of evidence to show the Court that Mr. Burns, as the defendant's contracting officer, followed the rates that were promulgated by the Bureau of Reclamation and not by such an agreement as purports to be evidenced by Plaintiff's Exhibit 2-A.

Justice Madden: When you said, Mr. Sweeney, that Mr. Burns as the defendant's contracting officer—

Mr. Sweeney: Mr. Burns is the defendant's construction engineer. I want to make that distinction clearly. Thank you for correcting me.

A. (Continuing) I forgot to add that on that letter, my signature is on that letter.

By Justice Madden:

Q. 66. Is the main office of the Bureau of Reclamation in Denver? A. Yes, sir. The chief engineer is in Denver where all construction matters are handled.

Mr. Sweeney: Mr. Wunderlich is in Denver, too, Your Honor. He is a Denver contractor.

Mr. Ruddiman: If the Court please, I have no objection to the admission of this letter as showing that such a letter was sent from the chief  
2224 engineer to the construction engineer, but

I do object to any statements in that letter as proof of the facts stated.

Justice Madden: Well, it may be admitted.

(The document above referred to previously marked Defendant's Exhibit S for identification, is now received in evidence and filed in connection with this case.)

Mr. Sweeney: Please mark this next as Exhibit T.

(The document above referred to was marked Defendant's Exhibit T for identification as requested.)

By Mr. Sweeney:

Q. 67. Now, we show you a document marked Defendant's Exhibit T which purports to be a copy of a letter dated August 24, 1940 from the construction engineer to the chief engineer. Tell His Honor, please, if that is your letter and explain it in some detail. A. This is a letter dated August 24, 1940 in Denver, Colorado, from the construction engineer to the chief engineer. The subject is: "Proposal submitted by the Martin Wunderlich Company in reference to borrow pit No. 2".

It refers in paragraph 1 to—I now quote: "Under date of July 10, 1940, order for changes No. 2 was transmitted to the Martin Wunderlich Company. The order for change was for the express purpose of settling the controversial question of cobble borrow area from which cobbles were to be obtained for the construction of the Vallecito Dam."



Paragraph 2 is as follows: "As originally planned, the cobble borrow pit was shown to be below the dam and on the left side of the river. During the contractor's operations, he elected to set up his screening plant on the left side of the river in earth borrow pit No. 2 and about 1,000 feet upstream from the left abutment."

Paragraph 3: "The operations in earth borrow pit No. 2 revealed that in the area adjacent to the contractor's screening plant the material excavated yielded about twenty-one percent plus five-inch cobbles and since the yield was heavier than would ordinarily be expected, a certain area of earth borrow pit No. 2 was designated as cobble borrow pit in lieu of the area below the dam which was not at all convenient for the contractor's operations."

Paragraph 4: "While the increase in cost as shown in the order for change was \$30,000.00, it is believed the amount excavated plus overhaul would have been in the amount of \$42,000.00 which we believe was a fair and equitable offer to the contractor."

Paragraph 5: "This order for changes No. 2 was returned to your office by Mr. Martin Wunderlich in person on August 21, 1940, with the statement that 'this order was not acceptable to him'. It must be assumed that his letter of July 19, 1940, 2226 was written as a counter-proposal in lieu of order for changes No. 2".

Paragraph 6: "In compliance with your request,

this office has analyzed the proposition submitted to your office and finds that:

“(a) The Martin Wunderlich Company is attempting to set up all of earth borrow pit No. 2 as cobble borrow pit (with the exception of 80,000 cubic yards excavated in the fall of 1939) for which he requests payment of thirty-two cents per cubic yard.

“(b) No price per cubic yard is mentioned for the 80,000 cubic yards excavated in 1939; however, previous correspondence indicates he expects thirty-five cents per cubic yard plus overhaul for separating the rock by rake-dozer on the fill.”

“(c) The Martin Wunderlich Company further recites that if the cost for the work is less than thirty-two cents per cubic yard, then the Bureau would not be required to pay more than the cost plus ten percent.”

We then go on to set up a table of three items, present contract price, order for changes No. 2, and the contractor's proposal, to show what the difference in amount would be. You don't want to go into all that?

Q. 68. No, not the detail, but refer please to the last, to paragraph 7 and please read that in the record and tell His Honor is that the recommendation you made?

A. Paragraph 7: “The contractor's counter proposition would increase the cost of construction by the amount of \$121,823.80, or twelve and a half cents per cubic

yard on every cubic yard excavated from earth borrow pit No. 2, whereas the actual cost of screening is less than five cents per cubic yard, a figure previously discussed. Mr. Wunderlich's proposition does not appear to have any merit whatsoever and we recommend no consideration be given it.

"8. Since it is felt that a reasonable offer was made to the contractor as settlement for the work involved in order for changes No. 2, which would amount to \$42,795.00, it is our opinion that in returning the order for changes as not being acceptable to him, the contractor should be notified to proceed with the work in compliance with the specifications and that no further negotiations be carried on."

It is signed by C. A. Burns.

Q. 69. And is that a copy of the letter and do you now recollect it, Mr. Burns? A. Yes, sir.

Mr. Sweeney: It is now offered.

By Mr. Ruddiman:

Q. 70. Mr. Burns, payment was never made under change order No. 2, was it? A. Why, I think—Well, I'd say it wasn't, no. It's made an exception in the final payment, I believe. In other words, in the final payment, I believe Mr. Wunderlich made a lot of exceptions and the payment was never made. Now, we did do this, we paid him, I believe, twenty-three cents per cubic yard.

Q. 71. My point is this, isn't it a fact that payment for the cobble borrow was made under change order No. 3 rather than under change order No. 2? A. Now, you have to get me some information on that because right off hand, I'd have to look that up. I just couldn't tell you. I just wouldn't know. I don't have that information. As I say, it could be ascertained. I don't know.

Mr. Sweeney: The facts are all in the record for the information of the Court.

A. (Continuing) I don't know. I really don't.

Mr. Ruddiman: If the Court please, I am going to object to this letter from the construction engineer to the chief engineer. It relates to change order No. 2 which the record will show was never followed by either party. The government made payment on the basis of change order No. 3, an entirely different change order, entirely different method. I don't see the relevency of any recommendations as to payment under change order No. 2. It was never followed.

Mr. Sweeney: This was part of the negotiations, obviously, between Mr. Burns and the contracting officer, and of course no payment has been made under either order, whether 2, 3, or any  
2229 other, and all the details, facts regarding that, were presented to the Court in Denver.

We are now showing to the Court what Mr. Burns did during these negotiations with regard to the settlement of these claims and particularly with



respect to this issue of the so-called alleged rental agreement. You see, the plaintiff has put—

Justice Madden: I didn't hear anything in this letter about rental rates.

By Mr. Sweeney:

Q. 72. Tell His Honor, please—

Justice Madden: Is there something there?

By Mr. Sweeney:

Q. 73. In calculating this sum of \$42,000 that you recommended, did you have to use equipment rental rates? A. I have to go into this a little bit now because—

Q. 74. Tell His Honor, please, with respect to the details regarding this document, were they prepared by you or one of your assistants, the calculations? A. The calculations were all made by Mr. Walton.

Q. 75. Is he the gentleman at the table? A. Yes.

Q. 76. He was your field engineer? A. He gave me these in a memorandum which is in the file, Vallecito files. The reason I couldn't say  
2230 right here clearly in this letter, they are not shown, but in the compilation of them, we would have to use it because you couldn't put it in here. It is not in the letter; it's a summary here.

Mr. Sweeney: For Your Honor's information, all the detail facts regarding these computations have been presented exhaustively in defendant's proof

which were presented in Denver last October through Mr. Walton, the man who made them.

Justice Madden: Would the totals that those detailed compilations bring correspond with what you find in this letter?

Mr. Sweeney: The contracting officer has made an allowance of \$44,000.00. He has increased the sum recommended by Mr. Burns a little bit. Those facts are set out in the petition, Your Honor.

Justice Madden: I don't know. There doesn't seem to be much in this communication that proves much, if there is anything in it, which relates to the rental rates. I suppose it does tend to confirm the witness's present testimony about that.

Mr. Sweeney: This is part of the proof, if Your Honor please, he is showing there were these negotiations touching the efforts of the parties to each an equitable adjustment as to what increase, if any, would be made.

Justice Madden: It may be admitted.

(The document above referred to previously marked Defendant's Exhibit T for identification, is now received in evidence and filed in connection with this case.)

Mr. Sweeney: Thank you.

2231

By Mr. Sweeney:

Q. 77. We show you what purports to be a copy of a letter dated October 4, 1941, signed C. A. Burns, to the chief engineer and only so far as it

refers to the last paragraph: "Final calculations show that there is no overhaul involved in any of the borrow pit items." Does that refresh your recollection? A. Yes, this letter is dated October 4, 1941, Vallecito, Colorado, from the construction engineer to the chief engineer, and paragraph 4: "Final calculations show that there is no overhaul involved in any of the borrow pit items."

Justice Madden: What is that for?

Mr. Sweeney: It is offered, if Your Honor please, for showing there was no overhaul involved in connection with claim Item No. 7.

Justice Madden: Does this witness know there wasn't? If he does, why doesn't he testify?

The Witness: I know there was no overhaul involved.

Justice Madden: I don't see much point in the letter. If you want him to testify there was no overhaul, why offer the letter?

Mr. Sweeney: Just mark it for identification; that is all, and have it go along with the record.

(The copy of letter above referred to, marked Defendant's Exhibit No. U for identification only,

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2245

By Mr. Ruddiman:

XQ. 117. I believe you testified, did you not, that the rates for equipment submitted by the plaintiff on the cobble borrow claim were twice the A.G.C. rates? A. That was in the letter, yes, that I read.

XQ. 118. Was that your testimony at this hearing? A. Approximately; I think it said approximately.

XQ. 119. Do you so testify now that those rates were— A. Whatever is in that letter; that is right.

XQ. 120. The rates submitted by plaintiff were hourly rates, were they not? A. As I recall, they were.

XQ. 121. And isn't it a fact that the A.G.C. has no hourly rental rates?

Mr. Sweeney: Objection, if Your Honor please. We object to this witness being questioned regarding the details of what the A.G.C. rates are. He was called only for the limited purpose of testifying with respect to the two main points involved which related to alleged protests and the other was rental rates. He has told what rental rates he followed. I don't think he should be questioned—

Justice Madden: His recollection may not be very good on it, but I think Mr. Ruddiman is entitled to find out what he does testify to now. He has before him his former letter and if that doesn't

refresh his recollection, he can say so. A. I'd  
2246 have to look at the book to see. I don't recall.

It is on the table right here. I really don't recall the facts of it.

Mr. Sweeney: Pardon me. Mr. Burns is asking for a letter.



By Mr. Sweeney:

Q. 122. Now, what letter is that, Mr. Burns? A. No, I was just asking for that rental rate.

I think this covers your question.

By Mr. Ruddiman:

XQ. 123. I was asking about A.G.C. rates. A. I don't know. I really don't know.

XQ. 124. You don't know, then, whether or not the rates submitted by plaintiff were twice the A.G.C. rates? A. I'd have to look at that letter; I was referring to our rates here, is what I think I was referring to. If it is in there, that is all right, but I still say this is based on the A.G.C. and it is approximately the same. I may have had the A.G.C. rental rate at that time, but I don't recall all those details now because I don't have all that information with me. I assume they did. This is just off the record here.

XQ. 125. I wish to call your attention to page 2 of Defendant's Exhibit S where you stated that the equipment rates used by the contractor are about one hundred percent over the proper A.G.C. rates. Is that still your testimony, that the rates submitted by plaintiff were one hundred percent over the proper A.G.C. rates? A. That is in 2247 the letter, but what I had in mind was, these rates here.

By Justice Madden:

Q. 126. Referring to— A. Referring to this here (indicating).

Q. 127. —to the Bureau of Reclamation rates.

A. Yes, because I have always understood and I think it is—these are approximately the rental Associated General Contractors rates. Now, I don't know as I ever checked that to be a hundred percent, but I think that Walton probably has.

Mr. Sweeney: That is in evidence, if Your Honor please, as Plaintiff's Exhibit 17-B.

Justice Madden: The A.G.C. rates?

Mr. Sweeney: The A.G.C. rates are and the Bureau's equipment rental schedule is in evidence as Plaintiff's Exhibit 17-C.

By Mr. Ruddiman:

XQ. 128. I believe you testified also there was no overhaul for the materials excavated from borrow pit No. 2, is that correct? A. Yes.

XQ. 129. Well, did you mean overhaul for cobble borrow or for earth borrow? A. I think  
2248 we have taken the entire borrow pit. As I recall, our computations were for the entire area. I don't think there was ever any segregation made. We attempted at one time to designate one, but it was never designated so the whole thing was as one borrow pit. I believe that is correct.

XQ. 130. Well, isn't—

Mr. Sweeney: May the witness be permitted to

conclude his answer? Please don't interrupt him.

A. (Continuing) I was going to say if there is any detail in that other than that being a general borrow pit, you would have to get that from Walton. My recollection is it was just taken as a borrow pit from the dam up to the end.

XQ. 131. Isn't it true that the limit beyond which you had to pay for overhaul for cobble borrow was about half that for the overhaul for earth borrow?

Mr. Sweeney: Just a minute. That involves an interpretation of the contract. A. That would be in the specifications, I believe.

By Mr. Ruddiman:

XQ. 132. When you testified that there was no overhaul, on which basis are you testifying? A. I am testifying we designated the pit as an earth borrow pit all the way through, through its entirety on the left side of the river. That is what you are interested in now, left side of the river.

2249 XQ. 133. Your statement there was no overhaul would not necessarily stand if that pit was a cobble borrow pit, is that correct? A. If it had been designated cobble borrow pit, that is probably true, although I don't recall just what the overhaul was. I am sure you have it before you. I don't have it. I don't happen to know now.

XQ. 134. You don't know what the distance was? A. I believe it was five thousand feet. I am sure it is all in the specifications which could be read into

the record. I don't happen to have it. You could get it before me.

Mr. Sweeney: It's all been read into the record.

A. (Continuing) I haven't gone into this case for a good many years so I am a little bit—

By Mr. Ruddiman:

XQ. 135: I was asking if you knew what the actual number of overhaul was for borrow pit No. 2? A. I don't recall.

Mr. Sweeney: Paragraph 52, the applicable paragraph of the specifications—

A. (Continuing) I don't recall it now. I'd have to get the records of our computations. I don't recall it now.

\* \* \* \* \*

2361

# CLAIM NUMBER 17

## Futher Direct Examination

By Mr. Ruddiman:

Q. 1570. Mr. Stewart, did you have to separate all of the material which came out of Borrow Pit Number 2 during the 1940 season? A. Yes.

Q. 1571. And in the fall of 1939? A. Yes.

Q. 1572. Mr. Stewart, if it is necessary to separate materials, is the cost affected by the percentage of cobbles that run in the materials? A. Not appreciably. If it has to go through the plant, that is where the greatest cost is.



Q. 1573. Why did you set up the screening plant in Borrow Pit Number 2? A. To separate  
2362 the cobbles from the material that was excavated from Borrow Pit Number 2.

Q. 1574. Was that the most practicable method of doing it? A. It was, for the production that was necessary to get out of that pit that year, yes.

Q. 1575. Why did you have to add a grisly to this plant when you set it up in Borrow Pit Number 2? A. To scalp off the large rocks so they wouldn't go down through the feeding hopper feeders and over the belt and over the separating screen and into the other bins; and they went on over the plant and onto the ground and was picked up at various times with a shovel and loaded, as there was reason for diverting them around the plant itself, or over it. There were so many large ones that it would just knock the plant all to pieces if they went through.

Q. 1576. When you set up the screening plant in Borrow Pit Number 2, did you plan to use both the lima shovel and the lima dragline at all times in Borrow Pit Number 2, during the 1940 season? A. No.

Q. 1577. Why not? A. It was necessary to take the dragline and move it to Borrow Pit number 1, because that was where we got our Number 2  
2363 material—the most of the Number 2 material for the embankment. Therefore, at times, we would move it over there to bring that section of the embankment up; and when it was up

with the rest of the sections, or a little above, then we would move it back and work it in Borrow Pit Number 2 until such time as necessary to move it back.

Q. 1578. Was any complaint ever made that you did not have sufficient excavating equipment in Borrow Pit Number 2 during the 1940 season? A. No.

Q. 1579. Was all of the embankment that was placed from materials excavated from Borrow Pit Number 2 accepted by the Government? A. Yes, with the exception of the stripping, and that was wasted.

Q. 1580. Is it or is it not a fact that the material from the second cut of area Number 1 of Borrow Pit Number 2 consisted of materials that were similar in every respect to material from the subpits in Borrow Pit Number 1? A. Read that question.

(Question Number 1580 was read by the reporter as above recorded.)

A. No, they were not.

Q. 1581. What was the difference? A. There was cobble in them. The subpits in Borrow Pit 2364 Number 1 didn't have cobble in them.

Q. 1582. How about the moisture content? A. There was very little moisture content in Number 2 pit, or in the material of Number 2 pit anywhere.

Q. 1583. Would it cost from 1 cent to 1½ cents to remove rocks on the embankment from material excavated from Borrow Pit Number 1? A. No.

Commissioner Evans: Will you clarify that 1 cent or 1½ cents—for what?

Mr. Ruddiman: A cent or a cent and a half per cubic yard.

Commissioner Evans: All right.

The Witness: We didn't make any provisions on the embankment for moving cobbles from any of the Number 1 borrow. If there was a stone came in a load, it was either removed by the dump man, or sometimes the bulldozer man kicked it off with the bulldozer. We didn't have men or equipment on the embankment for taking stones out of the materials that came from Borrow Pit Number 1.

By Mr. Ruddiman:

Q. 1584. Was the bulldozer used for any substantial period of time in kicking cobbles that came from Borrow Pit Number 1 over to the cobble section of the fill? A. No.

Q. 1585. After you received Change Order Number 3, did you ever state to anyone connected with the defendant that you expected to submit a claim for adjustment under this change order, based merely upon the cost of separating the materials in Borrow Pit Number 2? A. Yes, we did state that.

Q. 1586. Based purely on the cost of separation? A. No, we did not—on the basis of cobble operation from point of excavation to point of disposal. This wasn't only a separation job, but it was a cobble excavation also.

Q. 1587. Would you have been able to pick out the costs of separation alone from your cost records? A. It would have been difficult to pick out everything that would actually come under the separation. The actual plant and the labor that it took to run the plant, yes. But that doesn't cover all separation. You have additional haul to the plant, dump at the plant, hauling away from the plant. You have a break there. And all this hauling and transportation equipment.

Q. 1588. How did the difficulties in excavating compare with the difficulties of excavating in Borrow Pit Number 1? A. There was no comparison there, because in Borrow Pit Number 1 we didn't have any cobbles, and it wasn't cemented material. In Borrow Pit Number 2 we had the cobbles and several places was cemented material, and in instances it was necessary for us to drill it and shoot it with dynamite in order to excavate it at all.

2366 Q. 1589. Would that affect your costs? A. Yes.

Q. 1590. In what respect? A. Well, where we shot it there would be that additional; and where we didn't shoot it and it was still hard, the hardness caused a lot of additional cost, wear and tear on shovels and draglines.

Q. 1591. And how would that affect your production, as compared with Borrow Pit Number 1? A. It would slow your production down, away under earth, or straight earth.



Q. 1592. I will show you Defendant's Exhibit Number 17-R, which is a report on excavation work done in the Panama Canal, and ask you if, up to the time of defendant's testimony in this case, you ever saw that report. A. No, I hadn't.

Q. 1593. Is it a fact that Mr. Davis discussed costs with you on this job, and at the end of the month gave you that report, or any other cost report? A. Mr. Davis never gave me any report, or didn't discuss costs with me at all. In fact, the job was going on a good many months before I ever became acquainted with Mr. Davis.

All of this was taken up with our office in Panama, and we had a man there that took care of it, and I didn't enter into the cost of it at all until our man got it, and occasionally he would tell me the cost. I was interested in it to that extent. But, so far as Mr. Davis ever giving it to me or discussing it with me, he didn't.

Q. 1594. Is it or is it not a fact that you told Mr. Davis that you thought the costs on that report, or any other report, reflected the actual cost of the work? A. No, it is not a fact.

Q. 1595. Was any payment ever made to you upon the basis of the costs shown in Defendant's Exhibit Number 17-R? A. No.

Q. 1596. Mr. Stewart, you were present at the Panama job, were you not? A. I was the first employee on the Panama job for the Wunderlich-Oaks Construction Company.

Q. 1597. And on that job did you have 14-yard carrimors? A. Yes.

Q. 1598. Now, I will call your attention to Page 17, which lists a total hours of 7800 for the three carrimors during the life of this job, but which shows no minor repairs whatsoever.

Mr. Stewart, did you operate these machines for 7800 hours without any minor repairs? A. 2368 No.

Q. 1599. What types of minor repairs did you have on these machines? A. I remember these particular machines—we broke some axles on them. We would have cables, which would be minor repairs, and, working steady all the time, there is quite a lot of that used. You have got your blade bits and cutting edges, your cutting edge corners, bolts, occasional belting, and so forth, that was minor repairs.

Q. 1600. And did you have such items on the Panama job on the carrimors? A. Why, yes.

Q. 1601. During that job did you have minor repairs on the two Euclid semi-trailer bottom dump trucks, 18 cubic yard capacity? A. Yes. We had minor repairs on all equipment that we worked.

Q. 1602. Mr. Stewart, on the Vallecito job, when did you perform your overhaul and major repairs? A. In the part of the year that we were not operating on the job.

Q. 1603. And when was that? A. In the winter time, or from the time we shut down in the early

part of the winter to early spring. We shut down during that time due to climatic conditions, and all the equipment that required any overhauling, we would take it into the shop and tear it down 2369 and overhaul it during that time, in order that it would be in good shape for the working season following the winter, and also to keep our good men—good mechanical forces—employed, so that we would have them for the next season, or the following season, because we thought—in fact, we knew, that by having those same men that were familiar with the equipment that we were working, and had been with it for sometime, we could get by with it a lot better than if we would lay them off and lose part of them the next season.

It is always a lot better to have your old men stay with you that are familiar with such equipment than to take new men on.

Q. 1604. Mr. Stewart, did Defendant's Exhibit 17-R have anything to do with the payments made under the escalator clause on your Panama contract? A. No.

By Commissioner Evans:

Q. 1605. If you know. Do you know? A. Well, I don't understand the escalator clause too well, or didn't understand the escalator clause too well; but I don't believe it did.

Fuel and gasoline was affected by the escalator clause—that is, the prices. And labor was also.

But, otherwise, there was nothing else in here that I see that was affected by it.

2370 By Mr. Ruddiman:

Q. 1606. Have you finished your answer? A. Yes.

Q. 1607. Mr. Stewart, after the Panama job was completed did you repair the equipment? A. Yes; that that needed it, we repaired.

Q. 1608. Was that an extensive operation? A. No. Our equipment was in pretty good shape and we kept it that way throughout the job; although we had so much of it, it took some time.

Q. 1609. Mr. Stewart, is there any basis of comparison between a D8 tractor and a 901 dragline, as far as the cost of field repairs is concerned? A. Well, there is no comparison in the machine. Therefore, I don't believe there would be any basis of comparison in the cost between the operation of them, or the maintenance, or anything else. There is no comparison in the operation, in the original cost, or anything pertaining to it. There is no comparison.

Q. 1610. What kind of maintenance items would you have for the dragline? A. Well, just in operating, the maintenance—or when operating, the maintenance would be cables, bucket repairs, bucket teeth, drag pans. That is for the dragline.

2371 Q. 1611. What kind of maintenance items would you have on the D-8 tractor? A. You



would have the cables and—it all depends upon what attachment was on the tractor, if it was a bulldozer or a scraper. If it would be a bulldozer, you would have you bulldozer blades, corner bits, bolts, cables, sheives, power unit, friction bands, and such things, that might go wrong with it generally.

Q. 1612. These items of cables and bands on the hoist, and cutting edges, which you have just described, are items used in connection with the bulldozer— is that not correct? A. Well, it is with the bulldozer itself, yes, and the power unit that operates the bulldozer from the tractor.

Q. 1613. In the fall of 1940, after you finished placing the embankment from Borrow Pit Number 2, were there any other operations upon which you used equipment? A. Yes.

Q. 1614. Approximately how long did these go on? A. Well, throughout November.

Q. 1615. Of what year are you speaking? A. 1940.

Q. 1616. Over the life of a piece of equipment, is it unusual for the total cost of field repairs and maintenance to exceed the major overhaul and repairs? A. Under hard conditions, many times it will exceed it greatly. Minor repairs will  
2372 exceed the major greatly.

Q. 1617. And what kind of conditions did you encounter on the Vallecito job? A. Good tough ones. The rock was hard, abrasive; and the sand was the same. The particles were hard; very abrasive material all through. It would cut metals, you know,

just as quick as any material that you would find any place, and as fast.

Q. 1618. What was the condition of your equipment at the beginning of the 1940 working season?

A. The equipment at the beginning of the 1940 working season was in good shape. We had worked it all over the winter before that.

Q. 1619. Were the Euclid 18-yard trucks the only new Euclid trucks you had on this job? A. No. All of the 12-yard and 15-yard Euclids were new on that job.

Q. 1620. When did you get the 12 and 15-yard Euclids? A. Some of them—the most of them in 1939, and I believe some of them in the fall of 1938.

(Discussion followed off the record.)

(There was a short recess.)

By Mr. Ruddiman:

Q. 1621. What is the greatest item of maintenance, Mr. Stewart, in connection with a sheepsfoot roller?

A. Keeping the feet built up as they wear off from rolling the material. The material will cut the feet down so that they wear off at the corners, and you have lost your surface. That is the greatest maintenance.

Q. 1622. Does it make any difference whether the roller is new or old as to maintenance cost? A. No.

Q. 1623. What was the character of the material that was coming from Borrow Pit Number 2, over which these rollers operated? A. Well, it was of the

same character that came from the required excavation that was separated. It was abrasive material; sand particles in it; rock; gravel.

Q. 1624. Mr. Stewart, was it your practice on this job, when repair parts were received, to charge them directly to the items of equipment for which they were purchased, regardless of whether they went onto the equipment or remained in stock? A. No, it was not. The parts were not charged to the equipment until the equipment received them, or they were used on the equipment.

Q. 1625. During 1940, what kind of work did you use the 20-yard Euclids for, as compared to the 12-yard Euclids? A. The 20-yard Euclids, in 1940, were used principally to haul the fine material from the separating plant; where the 12-yard  
2374 Euclids hauled all the cobbles from the separating plant, and boulders from the pit, and such work as that.

Q. 1626. How did the usage of the 20-yard Euclids compare to that of the 12-yard Euclids? A. There wasn't much comparison as far as the types of material they hauled and the abuse they got, because the material—fine material—from the separating plant wouldn't beat up any equipment. The haul was shorter than the hauls in hauling boulders from the pit, and material from the pit to the plant; and also, it wasn't near as hard on the 20-yard Euclids hauling the finer material as on the 12-yard Euclids hauling the cobbles from the plant and boulders from over the plant. That was all done by

the 12-yard Euclids. It was much harder work than the 20-yard Euclids had.

Q. 1627. What was the length of the haul from the separating plant to the embankment, as compared to the length of the haul from the borrow pit to the separating plant? A. Well, the haul from the borrow pit to the separating plant varied, where the haul from the separating plant to the embankment was constant; and the haul from the farther part of the borrow pit to the plant was considerably long than from the plant to the embankment.

Q. 1628. Which had the most difficult haul—the 20-yard Euclids or the 12-yard Euclids? A. 2375 The 12-yard Euclids.

Q. 1629. How did the difference in usage of the 20-yard Euclids as compared to the 12-yard Euclids affect the cost in maintenance for each? A. Well, any machine, regardless of whether it is a 12 or a 20-yard Euclid, if it is a similar type of machine that has harder usage, the maintenance cost on them naturally would be greater than it would on one that wouldn't work as hard, or didn't have as hard work.

Q. 1630. Were the conditions under which equipment operated in Panama at all comparable to the conditions under which equipment operated at the Vallecito project? A. No.

Q. 1631. Why not? A. In the Vallecito project it was well over 7500 feet elevation and had a great variation in temperatures and had tougher, harder materials, abrasive materials; where, in Panama,



we were at sea level and, in fact, considerable of our work was below sea level. Materials were not abrasive. It had a nearly constant temperature. We didn't vary 20 degrees the year round.

Q. 1632. What effect does the variation in temperature have on cost of maintenance? A. Well, it has a great effect on metals. Therefore, it would affect maintenance. And then, also, the elevation has a great lot to do with the strain that is put on motors. After all, a motor is designed, and its horsepower, at sea level. And you take a machine with a certain horsepower motor in it and take it to a high elevation—you are naturally putting a strain on it to perform its work.

Q. 1633. Do you mean that motors do not develop as much horsepower at the higher elevations as they do at the sea level? A. That is what I mean.

Q. 1634. And how does that affect the cost of maintenance? A. Well, when they don't develop their horsepower that they are designed for at sea level—you take them to where you don't get the horsepower out of them to carry their capacity, you are straining your motor; also straining your equipment. You get more jerks and such as that; where at sea level you won't have that condition.

Q. 1635. Well, if you were using an engine at 7500 feet, would that engine have to perform more revolutions to accomplish the same horsepower that it would at a lower elevation? A. Well, they are not designed to change the revolutions. You lose your horsepower.

Q. 1636. You lose your horsepower? A. Yes; you lose your horsepower.

By Commissioner Evans:

Q. 1637. How far above sea level do you have to go before that loss becomes noticeable? A. 2377 Something over 3,000 feet.

I think up there our horsepower was decreased 12 or 13 per cent.

By Mr. Ruddiman:

Q. 1638. Do you know what the temperature differentials were at Vallecito between day and night, as compared to those on the Panama job? A. During the working season at Vallecito, I couldn't tell you, but during the season I can tell you pretty close. That is, day and night, I couldn't tell you.

In Panama there wasn't four degrees—two to four degrees between day and night. The variation was from season to season—the maximum variation.

Q. 1639. Well, were the variations in temperature at Vallecito greater than they were at Panama? A. Seasonal, yes; and day and night, yes. Their seasonal variation there would be as high as 100 degrees.

Q. 1640. Is it or is it not a fact that minor repair do not vary a great deal from job to job? A. Yes, they do, depending upon the type of work you have and the material that you are handling.

Q. 1641. You mean they do vary a great deal? A.

They do vary a great deal, all depending upon the type of material you have and the conditions under which you are working.

2378 Q. 1642. I will show you Page 14 of Defendant's Exhibit Number 17-R, which lists an average hourly cost of 4-7/10 cents for minor repairs and miscellaneous expense per operating hour for a Loraine shovel dragline combination, three-quarter cubic yard capacity.

I want to ask you if the cost of maintenance of that piece of equipment is anything like 4-7/10 cents an hour, or was anything like 4-7/10 cents an hour on the Panama job.

Mr. Sweeney: Objected to, if your Honor please. The books would be the best evidence, if they are challenging the data set out in this exhibit.

Commissioner Evans: Objection sustained.

By Mr. Ruddiman:

Q. 1643. How often do you have to change a cable in connection with the operation of that piece of equipment? A. On this particular machine, in Panama, worked one shift—working one shift, three to four times a month it would be necessary to change a drag cable. The dump cable on the bucket is usually changed oftener. But the drag cable itself, three to four times a month, working one shift, is close to average of the times you would have to change that.

Q. 1644: Is that a minor repair? A. Yes.

Q. 1645. How much would a drag cable cost for that machine? A. About \$10.

2379. Q. 1646. And was that just the cost of the cable itself? A. Yes. That is what we paid for it, not including freight.

Q. 1647. And what other items of expense would you have in installing the cable? A. You would have your freight and storage and handling, transporting it to the location at which the machine was operating, installing it when it was necessary to, or when the one on the machine broke—other than the \$10 for the cable.

Q. 1648. Would those other items be more or less than the cost of the cable itself?

Mr. Sweeney: Objected to, unless this witness has personal knowledge of the factors. We understand that he was the outside man, supervising the work. We imagine the contractor employed office men whose job it was to keep track of these things.

Commissioner Evans: I do not think you have laid the foundation as to his knowledge.

By Mr. Ruddiman:

Q. 1649. What was your position on the Panama job? A. Superintendent of the Panama job.

Q. 1650. In that connection, did you from time to time make any check of costs on this job? A. I am quite familiar with what it requires to handle the average maintenance work and the labor it takes.



2380 As to determining the parts, that can't be determined on all maintenance work until such time as the machines are opened, if it is necessary to do that. But, such as this cable, I know it take transportation to get it to the machine from the warehouse. I know it takes warehouse facilities. I know it takes freight to get it to you. And I know it takes labor to get it on the machine after it is transported out there. And I know that costs something.

By Mr. Sweeney:

Q. 1651. Where did the cable come from? A. The cables down there came from the United States.

By Commissioner Evans:

Q. 1652. Did you keep yourself informed about the costs of the various items of parts? A. No. At times I would check such things as that—not pick out particular machines and check the actual cost on them, no. But, in installing a cable on a three-quarter yard dragline, I do know that there are additional costs other than the cost or purchase price of the cable.

Commissioner Evans: All right. Next question.

By Mr. Ruddiman:

Q. 1653. Do you know what you were paying your labor for making such installations of cable? A. Yes.

Q. 1654. How much were you paying per  
2381 hour? A. Mechanics were getting \$1.50 an  
hour; and the operator always helps install  
his own cable, and he was getting \$2 an hour.

Q. 1655. How long would it take the mechanic  
and the operator to install this cable? A. On that  
particular machine, ten to fifteen minutes.

Q. 1656. Did you have other items of maintenance besides changing the drag cable on this particular piece of equipment? A. Yes.

Q. 1657. What was the period of time over which you used your equipment on the Panama job? A. About 27 months.

Q. 1658. Did you have a two and a half ton repair truck on this Vallecito job? A. I don't know if it was a two and a half ton. I know we had several repair trucks, we called "service trucks."

Q. 1659. You had more than one? A. Yes. We had several pick-ups, and we had one truck that was heavier, but I don't believe it was a two and a half ton.

Q. 1660. Did that heavier truck take care of all the minor repairs on this job? A. No.

Q. 1661. Did it take care of most of them?  
2382 A. It took care of what it could take care of.  
If there was more than it could take care of,  
there was others brought out from the shop.

Q. 1662. Other mechanics? A. Other mechanics and their transportation also.

Q. 1663. Were pieces of equipment taken to the shop for minor repairs? A. If it needed minor re-

pairs and was of a type that it could get there by itself, that was where the minor repairs was made. If a machine was broke down to where it couldn't get to the shop, then it was done in the field.

Q. 1664. Did you have a tire truck? A. We had a tire man and a truck available to him whenever there was tire repairs to make in the field.

Q. 1665. How did you take care of the minor repairs on the shovel? A. We had a shovel mechanic and he had a transportation truck all the time, that he had all the time. Nobody else ever had it. He had an acetylene outfit on there, and all tools for the shovel; had cables. He took care of all of that—as much of it during the noon hour as he could get at at that time.

Q. 1666. Did he have mechanics that helped him? A. When his work necessitated help.

Q. 1667. When were bids opened on the Panama job? A. December 4th or 7th, of 1940.

2383 Q. 1668. And prior to that time were you overhauling equipment in preparation for the Panama job? A. No. I never heard of the Panama job until after Wunderlich-Oaks had bid it.

Q. 1669. Were you doing major overhauling and repairs during November of 1940? A. No.

Q. 1670. Did you ever rent a grader to the Bureau of Reclamation for \$1.25 an hour? A. Yes.

Q. 1671. What kind of grader was this? A. It was an old pull blade—one that you pull. The make was Caterpillar.

Q. 1672. Was it self-propelled? A. No. It was necessary to pull it with a tractor, or some other machine.

Q. 1673. It had to be towed—A. (interposing) It had to be towed.

Q. 1673. (resumed) —by another piece of equipment? A. That is right.

Q. 1674. Is that piece of equipment at all comparable to a power controlled Caterpillar grader?

May I withdraw that question?

Q. 1675. Is this towed grader at all comparable to a motor patrol grader? A. No.

2384 Q. 1676. Do you have any idea what the difference would be in the purchase price?

A. Oh, yes. The pull blades, or towed graders—the price of them is approximately \$2,000; where the motor patrol, or auto patrol, is around \$7,000; and now, at this time, about \$7,700.

By Commissioner Evans:

Q. 1677. Does that auto patrol have the push blade? A. No. It is self-propelled and the blade is underneath it, and it is all power controlled in the machine by the operator. It propels itself.

Commissioner Evans: I see.

By Mr. Ruddiman:

Q. 1678. What did the rental of \$1.25 per hour cover in the case of the towed grader? A. Just the grader—the machine; nothing else.

Q. 1679. The bare rental? A. Yes; nothing else.



Q. 1680. Did it cover anything for the operator?

A. No.

Q. 1681. Or for maintenance? A. No.

Mr. Ruddiman: That is all.

2385 (Discussion followed off the record.)

### Cross Examination

By Mr. Sweeney:

XQ. 1682. With regard to the last questions that Mr. Ruddiman asked you, we show you Defendant's Exhibit Number 17-F. Refer, please, to the item, "Grader Caterpillar, Power Control," and to the column, "Martin Wunderlich, Total Hourly Rate, \$4.54."

Tell his Honor, please, if it is not a fact that that is the equipment that you charged the defendant for at this rate. A. It is not a fact, because the machine the Bureau of Reclamation rented from us at \$1.25 never was in Panama, and we didn't have any type of grader in Panama, other than auto patrol graders, and we had six of them.

XQ. 1683. Mr. Stewart, please, we are not asking you whether you had this machine in Panama or not. The record only indicates that it was used on the Vallecito job; no indication that it was used on the Panama job.

Do you know there were no comparable figures regarding the Panama job?

Confine your answer, please, to whether or not that is the equipment that you are charging the

defendant for on the Vallecito job at an hourly rate of \$5.54? A. Where is this from?

XQ. 1684. These are from your figures.  
2386 A. Where at?

XQ. 1685. Right, here (indicating)—  
“Martin Wunderlich, Total Hourly Rate, \$5.54.”  
A. Well, I don't know about this, but I do know that they used the Caterpillar towed grader and paid \$1.25 an hour for it, and there was no comparison between the Caterpillar towed grader and an auto patrol.

XQ. 1686. I am asking you if it is not a fact that in this case the plaintiff is charging the Government \$5.54 an hour for the alleged rental of that grader—Caterpillar power control? A. I can't see that this is the towed grader that they used, listed—

XQ. 1687. (interposing) To your knowledge, is Martin Wunderlich charging the defendant for any other power control Caterpillar grader at \$5.54 an hour? A. If there is that piece of equipment there, that may be it. I can't tell you offhand what it is charging for the auto patrol.

XQ. 1688. Just assume that this is Martin Wunderlich's piece of equipment and he is asking a rental of \$5.54 an hour for it. Tell his Honor, please, if it is not a fact that the language there, “power control,” relates to the operation of the grader itself. It has nothing to do with the towing

of it? A. It doesn't say “towed grader,” and  
2387 the rate is comparable to an auto patrol rate.

XQ. 1689. Now, tell his Honor, please, if

it is not a fact that Grader Caterpillar Power Control is a towed grader. A. No, I won't tell him that is a fact, because I don't know—not from that paper, I don't know—or from that exhibit.

XQ. 1690. Mr. Stewart, please, we show you Plaintiff's Exhibit 17-E. Now, we call your attention to the third item on Page 2, which is captioned, "Power control Caterpillar Grader," the total hourly rate is \$5.54. Now, please, referring to Plaintiff's Exhibit 17-F, tell his Honor, please, if that refreshes your recollection that the Grader Caterpillar Power Control at \$5.54 an hour is the same item of equipment that is shown on Plaintiff's Exhibit 17-E, Page 2, Item Number 2. A. I would take it to be, according to the description here.

XQ. 1691. All right. Taking Plaintiff's Exhibit, please, is there anything to show that the power control Caterpillar grader, in connection with which the hourly rate is noted at \$5.54, is a towed grader? A. No—nor anything describing it as an auto patrol grader. It doesn't describe either of them.

XQ. 1692. Is it not a fact that auto patrol graders are listed on Plaintiff's Exhibit 17-E, and that you had two of them on the job? A. Auto 2388 Patrol Grader—right there (indicating).

XQ. 1693. And that the rental rate is \$2.59? A. That is what it states here.

XQ. 1694. That has nothing to do with Grader Caterpillar Power Patrol, for which the plaintiff

is asking \$5.54 an hour? A. Well, I don't know what method was used in arriving at this.

XQ. 1695. Now, tell his Honor, please, if it is not a fact that you do know, as a fact, that Mr. Wunderlich charged the defendant \$1.25 an hour for that same item of equipment, namely Grader Caterpillar Power Control, that he is now asking \$5.54 an hour? A. No, I don't know that to be a fact.

XQ. 1696. Now, tell his Honor, please, how many auto patrols—that is, items of equipment operated by their own power—did you have on the job? A. Auto patrols?

XQ. 1697. Yes, at Vallecito. A. Two.

XQ. 1698. Two. Now, tell his Honor, please, how many towed graders you had. A. One.

XQ. 1699. Now, has your recollection 2389 been refreshed that Grader Caterpillar

Power Patrol, at \$5.54 is the only single item of equipment that the Wunderlich Company had on this Vallecito job, of that kind? A. Repeat the question.

(Question Number 1699 was read by the reporter as above recorded.)

A. We only had one towed grader on the job. Whether this refers to the towed grader or not I cannot tell you. I do not know.

XQ. 1700. You told his Honor that you separated all the material from Borrow Pit Number 2 in the fall of 1939 and 1940. Tell his Honor, please, was that done with the separating plant, or did



you do it with the rakedozer? A. It was done by both methods.

XQ. 1701. Now, tell his Honor, please, if it is not a fact that a large part of that material, say, was separated on the embankment with the rakedozer.

A. Which material are you referring to?

XQ. 1702. Material that you excavated in the fall of 1939 and 1940 from Borrow Pit Number 2.

A. That that was separated in 1939—the large part of it was done with rakedozers; but in 1940, no.

XQ. 1703. Now, tell his Honor, please, if it is not a fact that the screening plant was not placed in effective operation until about June 21, 1940.

2390 A. It was sometime in June.

XQ. 1704. And before that time you used the rakedozers to separate the materials? A. Yes.

XQ. 1705. Now, Mr. Stewart, did we understand you correctly to say that the cost of screening the material from Pit Number 2 was not appreciably increased—that is, the cost of separating them was not materially increased by using this separating plant? A. No, you didn't understand me to say that, I believe. I don't understand what you are asking me, though.

XQ. 1706. Well, did you tell the Court that the cost of separating the materials was not appreciably increased unless you used the separating plant? A. No, I didn't tell him that.

XQ. 1707. You did not tell him that? A. No.

XQ. 1708. The cost would be increased, would it not, using the separating plant? A. Over what?

XQ. 1709. Over any other method that you used in doing it, in separating the cobbles. A. No, not necessarily. The reason for using the separating plant in preference to the rakedozers was because a rakedozer would not take care of the production required to do the embankment in 1940.

2391 XQ. 1710. That was not an effective way of separating the larger cobbles from the material? A. The what?

XQ. 1711. The rakedozer. A. It was not a productive way. You could not get the production to finish the embankment in 1940. Otherwise, it had been satisfactory, or I imagine we wouldn't have been permitted to do it in that manner.

XQ. 1712. Now, tell his Honor, please, if it is not a fact that the work was done satisfactorily using the rakedozer, and that you did encounter considerable difficulty in doing it that way? A. Although we did encounter difficulty, we were not stopped because it was unsatisfactory, nor was there any argument over it not being satisfactory.

XQ. 1713. Did you not have some difficulty, say, particularly in the spring of 1940, in preparing your screening plant to operate efficiently? A. We moved to the location at Pit Number 2 from where it was originally installed, and redesigned it.

XQ. 1714. You practically rebuilt it, installed additional motors? A. We eliminated a lot of it—a lot of the plant as it was set up in its original location, and we added other parts to it.

2392 XQ. 1715. In other words, it was not originally designed to eliminate plus 5 cob-

bles? A. It was not designed to fit the condition that existed at Borrow Pit 2.

XQ. 1716. And you did not purchase it for that purpose, did you? A. We purchased it to do the separation of the required excavation in the cobble borrow pits.

XQ. 1717. You have said, "the required excavation in the cobble borrow pits." Is there not a distinction between required excavation and also the cobble borrow pit? A. The cobble borrow pit that was original laid out on the plans—the only distinction there that I could see would be that one was required for a structure and the other was required to obtain materials.

XQ. 1718. You have referred to this cobble borrow pit, as shown on the plans. The specifications and the unit prices that are set up in them indicate that you were to excavate 50,000 cubic yards from that particular borrow pit, and the rate for that was 35 cents, was it not? A. Yes.

XQ. 1719. Now, the difference between the cost of excavated earth materials, which was 23 cents, and the cost of excavated cobble materials, was 35 cents, or a difference of 12 cents? A. Yes.

2393 XQ. 1720. Now, if you had gone to the cobble borrow pit and excavated cobbles, 50,000 cubic yards, the quantity indicated, and had you been paid a difference of 12 cents, you would have been paid only \$6,000 more for that? A. Fifty thousand yards wasn't the amount required to

complete the cobble section. Therefore, there would have had to have been some extension of the pits to get the amount required.

XQ. 1721. You would have had to go back in Pit 2, or somewhere else to get cobbles? A. The cobble borrow pit required to get the material.

XQ. 1722. Confine your answer to the quantity of cobbles indicated in the contract as possibly coming from the cobble borrow pit, which was 50,000 cubic yards. Now, if you had excavated that 50,000 cubic yards, you would have been paid only \$6,000 additional—is that not so? A. Yes. But 50,000 cubic yards would have been sufficient if there would have been sufficient cobbles in the required excavation, or as it was set out in the contract. If there had been that amount in the required excavation, 50,000 cubic yards would have been sufficient to finish the cobble fill.

XQ. 1723. You did not encounter as much cobble in the required excavation as originally anticipated? A. That is right.

2394 XQ. 1724. You had two amounts set up—80,000 and 275,000 cubic yards of cobble, or 355,000 cubic yards. Do you recollect that you actually excavated about 231,000 cubic yards of cobbles—331,000 cubic yards? A. When the required excavation was done and the cobbles were separated from it, we were approximately 90 to 100,000 yards short of cobbles.

XQ. 1725. But is it not a fact that you excavated altogether, from all possible sources—required ex-



cavation and borrow pits — about 331,000 cubic yards of cobbles, from all sources? A. I can tell you if I refer to the estimates, which is an exhibit.

Mr. Sweeney: Yes.

Commissioner Evans: Do you want him to take time to look it up?

Mr. Sweeney: It is not necessary.

Commissioner Evans: We will recess until 9:30 in the morning.

(Whereupon, at 5:00 o'clock p.m., a recess was taken to 9:30 o'clock a.m., Tuesday, June 3, 1947.)

IN THE  
UNITED STATES COURT OF CLAIMS

Martin Wunderlich, Ann M. Wunderlich, Marie  
Wunderlich, E. Marielle Wunderlich, and  
Theodore Wunderlich,  
a Partnership, Trading under the Name of,  
MARTIN WUNDERLICH COMPANY,

vs.

THE UNITED STATES

No. 46307

Washington, D. C.,

June 3, 1947,

Tuesday, at 9:30 o'clock a.m.

**TESTIMONY FOR PLAINTIFF**

The hearing was resumed, pursuant to the recess previously noted.

Present: (The same appearances as previously noted.)

**B. H. Stewart**, resumed the stand for further

Cross Examination

By Mr. Sweeney:

XQ. 1726. Mr. Stewart, please, will you refer to the petition, Page 46, a copy of which is in front of you? Note, please, items 20 and 21 thereon; relating to the placing of cobble—80,000 cubic yards.

and 275,000 cubic yards, a total of 355,000 cubic yards.

Now, tell his Honor, please, if it is not a fact that you would have obtained that cobble from the required structural excavation and also from 2396 the borrow pits, with the exception of the 50,000 cubic yards of cobble under Item 16.

A. We would have, if the excavation had contained it.

XQ. 1727. Yes. That was where it was to come from. A. Yes.

XQ. 1728. With the exception of the 50,000 cubic yards. A. That was where it was to come from.

XQ. 1729. Now, tell his Honor, please, if it is not a fact that Item 16, the 50,000 cubic yards, was set up as a deficiency item in the event that the required structural excavation did not produce that amount of cobble. A. The required structural excavation would have produced 275 and 80.

XQ. 1730. Yes. A. And then 50,000 cubic yards is all that would have had to come from the cobble pit.

XQ. 1731. Now, the record shows that your company was paid for a total; for placing 331,000 cubic yards of cobble. That was less than the amount that was estimated in the schedule by about 34,000, was it not? A. If that was what we were paid for, it was.

Mr. Sweeney: That was what you were paid for.

XQ. 1732. Now, tell his Honor, please, if it is not a fact that had you gone into this cobble pit

2397 to obtain this 50,000 cubic yards that is indicated in Item 16, that you would have had to go through the same process of operation in that pit as you did in Borrow Pits Numbers 1 and 2. A. No, that is not a fact.

XQ. 1733. What is the fact? A. We would have had to separate that, but 50,000 yards would not have been enough.

XQ. 1734. But, with regard to going into this cobble pit, you would have had to separate it, would you not, in the usual way? A. Yes; it was cobble.

XQ. 1735. Will you estimate about how much material you would have had to separate in order to obtain 50,000 cubic yards of cobble? A. The cobble quantity, according to Item 16 here, would have been 50,000 cubic yards.

XQ. 1736. About how much material would you have had to separate to obtain that cobble? A. I couldn't say that, because we didn't do it.

XQ. 1737. But, on the basis of your experience as superintendent for the plaintiff in this case, is it not a fact that you would have had to excavate about 350,000—would you not have to excavate a very large amount, possibly 350,000 cubic yards?

A. I wouldn't say that to be a fact.

2398 XQ. 1738. Well, assuming that you would have obtained—just a hypothetical question—about 30 per cent of cobbles from that material, you would have had to excavate on that basis about 150,000. A. If 30 per cent is correct. I do not know that.



XQ. 1739. And tell his Honor, please, if it is not a fact that, in doing that, you would have had to move and set up the separating plant in that particular pit? A. The separating plant where it was originally erected was not far from that pit.

XQ. 1740. Well, you would have removed it, though, would you not? A. We didn't intend to.

XQ. 1741. You didn't intend to? A. Not for that pit.

XQ. 1742. If you did not do that, you would have had to carry the materials, would you not, from the source of production to the separating plant? A. Naturally.

XQ. 1743. And that would have cost you considerably, would it not? A. It was a very little farther distance than the lower end of the spillway, which the materials from the lower end of the spillway went to the same separating plant where it was originally set up, and the distance from the cobble borrow pit was right across  
2399 the river from the downstream end of the spillway, or very little farther from the excavation of the downstream end of the spillway, and all of that material was hauled to the screening plant where it was originally erected.

Therefore, we would not have moved the screening plant from the place it was originally erected and set up over to the cobble borrow pit. We would have moved the material from the cobble borrow pit to the screening plant.

XQ. 1744. If you did not intend to move the screening plant, you would have had to use your trucks to move it. A. We didn't intend to move it, and we would have had to use trucks regardless.

XQ. 1745. That would have involved considerable wear and tear on your equipment, handling those heavy cobbles. A. We anticipated such wear and tear.

XQ. 1746. You have already testified with respect to Item 16.

Had you gone into that pit and excavated the material there would have been a difference of 12 cents a cubic yard, or a total of \$6,000. If you had gone into the— A. (interposing) I did not testify to any \$6,000.

XQ. 1747. That is a plain mathematical proposition. The difference between 23 cents and 35 cents is 12 cents, I believe. A. Depending on the quantities you use.

XQ. 1748. Excavating in the borrow pit area, you were paid 23 cents for that earth borrow. A. In the earth borrow pit.

XQ. 1749. Under Item 16 you were to be paid 35 cents. A. Yes.

XQ. 1750. And the difference is 12 cents. A. Yes.

XQ. 1751. All right.

Now, had you gone into the borrow pit that is set up in the drawing and removed this 50,000 cubic yards, you would have been paid the difference between the 23 cents and the 35 cents, or 12 cents. A. For the 50,000.

XQ. 1752. For the 50,000, yes. A. Yes.

XQ. 1753. And that would have been 12 cents times the 50,000, or \$6,000. A. Six thousand dollars would be correct for 50,000 yards.

XQ. 1754. Now, the contracting officer, in making his equitable adjustment with regard to Claim Number 17, allowed your company \$44,000 for that, did he not? A. No, not for that. There was no adjustment made for Item 16 at all.

XQ. 1755. I said under Claim 17 he allowed you a total of \$44,000. A. I can't say that is the 2401 figure.

XQ. 1756. Your petition says that. A. it is in the record.

XQ. 1757. Yes. And you did not remove any cobble, did you, from the cobble pit? A. Not when I was on the job.

XQ. 1758. You were the superintendent, were you not? A. I was there until the first two weeks of January, 1941.

XQ. 1759. Now, with respect to the separating plant, tell his Honor, please, if it is not a fact that you had used it for the first two seasons—1938 and 1939? A. Repeat that.

(Question Number 1759 was read by the reporter, as above recorded.)

A. Yes, we had operated it in 1938 and 1939.

XQ. 1760. And you used it in separating the cobbles from the required structural excavation?

A. Yes.

XQ. 1761. That required structural excavation that relates to the outlet works, the spillway, the diversion channel and the cut-off trench? A. Yes.

XQ. 1762. And you were required to remove the plus 2 1/2 cobbles from that? A. Yes.

2402 XQ. 1763. Now, when you removed your separating plant in 1940 into Borrow Pit Number 2, you elected to do that yourself, did you not? A. Move to Borrow Pit Number 2?

XQ. 1764. Yes, over to Borrow Pit Number 2, in 1940. A. We were required to separate the material from Borrow Pit Number 2, which was cobble.

XQ. 1765. That was not my question. A. We elected to use the screening plant in preference to attempting to do it all with rakedozers, because they would not handle the quantity of material that was necessary to take from that cobble pit in the year 1940, and the screening plant could separate it a lot faster and get the production.

XQ. 1766. First, you elected to move the screening plant yourself? A. It was necessary to move to that location.

XQ. 1767. You elected to do it? You were not told to? A. No, we weren't told to move it.

XQ. 1768. It was your job to, say, remove the plus 5 cobbles from the fine materials that were placed in the fill? A. We were required to separate the cobble from the other material, yes.

XQ. 1769. Now, when you elected to move  
2403 the separating plant into Borrow Pit Num-



ber 2, I believe you testified then that you remodeled it in order to do the work more efficiently. A. We redesigned it in order to fit the conditions at the location where we set it up and to operate more efficiently.

XQ. 1770. You shortened the conveyor belt—that was one thing, was it not? A. That was necessary, due to the redesigning.

XQ. 1771. Yes. Before that, in 1938 and 1939, you had a conveyor belt that was quite long? A. It was long.

XQ. 1772. And you had difficulty in separating the materials? A. We had some difficulty, yes.

XQ. 1773. You also increased the power of the separating plant in 1940, did you not? A. No, we didn't. We had less power on it in 1940 than prior to that time, but we had more units of power.

XQ. 1774. That was what I meant. A. But less total power.

XQ. 1775. But you had more units of power? That is, you installed some additional motors? A. We eliminated the large Diesel engine on it, and electrified it, with the exception of the shaker screen that was driven by a small gas engine. And the rest of the plant was operated by electric power, and it was necessary over there  
2404 to put in a smaller stationary plant, as in the original location the electric equipment on the plant got its power, or got its electrical current, from the large power plant on the job.

XQ. 1776. That was a Kohler system, was it? A. No.

XQ. 1777. You also installed a five-inch grisly scalper, did you not? A. No. The same scalper unit in 1940 was on the plant as was on it prior to that time.

XQ. 1778. The spacing of the bars was changed to eliminate this plus 5 cobble? A. That is not the only unit that was installed in the plant to eliminate plus 5. There was other units in the plant to eliminate plus 5.

XQ. 1779. It now appears that you made considerable, say, improvements to this design, to this plant. You practically rebuilt it, did you not? A. We redesigned it and built it according to the redesign, but we eliminated and did away with and didn't use considerable of the plant that was set up originally, but added to the one we set up in 1940—added to it many other things.

XQ. 1780. Well, the simple proposition, Mr. Stewart, is that the plant as originally built 2405 was not intended to eliminate 5-plus cobbles, was it? A. That is not a fact, that isn't so.

XQ. 1781. All of the cobbles that you were paid for and that you placed on the dam embankment and at the toe of it, they all came from the borrow pits and from the required structural excavation, did they not? A. No, it didn't all come from the borrow pits and the structural excavation.

XQ. 1782. From where did it come? A. From Borrow Pit 2.

XQ. 1783. I said the cobble borrow pits. I am referring to the two of them—two, as shown on the drawing. A. Yes.

XQ. 1784. One on the right and one on the left side of the river. A. That wasn't what you asked me, as I understood it.

XQ. 1785. I am now speaking of the embankment earth borrow pits on the left and on the right hand side of the river. A. What are you asking about?

XQ. 1786. That was the source of your cobbles, was it not? A. No.

XQ. 1787. Earth embankment pits, plus required structural excavation? A. What didn't come 2406 from the structural excavation came from the Borrow Pit Number 2.

XQ. 1788. That was the source of it.

You did obtain some cobbles, though, from Pit Number 1, did you not?

A. A few boulders, as they were set aside with the shovel in the excavation and later hauled to the fill; but it was very few.

XQ. 1789. The point is that in obtaining those cobbles, you had to excavate earth and then separate the cobbles from it, did you not? A. I couldn't say which was separated from which. The cobble was separated from the earth. It was a separation.

XQ. 1790. It was a separation job—a dam building job? A. Yes, it was a separation job.

XQ. 1791. As distinguished from a road building job. A. Yes.

XQ. 1792. You would have had to separate that in any event, would you not? A. The cobble, in any event.

XQ. 1793. You would have had to separate that, would you not? A. The cobble material, yes.

XQ. 1794. When you were excavating materials you would have had to separate the cobbles before making the fill, would you not? A. That was required.

XQ. 1795. By the contract? A. Yes.

XQ. 1796. In any event, you had to do that? A. Separate the cobbles?

XQ. 1797. Yes. A. Yes.

XQ. 1798. At one point you testified about drilling and using dynamite in particular in a part of Pit Number 2. A. Yes, we did.

XQ. 1799. Did you have very much dynamiting and drilling in there? A. We didn't drill it all.

XQ. 1800. Tell his Honor, did you drill any more than one day, to the best of your recollection? A. We had the machines in there and the drills in there more than one day.

XQ. 1801. More than one day? A. Yes.

XQ. 1802. You do not know how much more, do you? A. I can't tell you how many days.

XQ. 1803. Well, as a fact, you did a comparatively small amount of drilling, did you not, in comparison with the total quantity of earth that was re-



moved? A. Compared with the total amount, 2408 yes.

XQ. 1804. Yes. It was very small.

Now, in regard to this Panama report that is in evidence as Defendant's Exhibit Number 17-R, you were present in Denver at the time Mr. Davis testified at this recent hearing, last November? A. I wasn't at the hearing at the time Mr. Davis testified. What Mr. Davis?

XQ. 1805. Mr. Davis—Bruce Davis, from Panama. A. I wasn't at the hearing that day.

XQ. 1806. You were not at the hearing that day? A. No. There was three days of that hearing I wasn't there.

XQ. 1807. You were not there on the day Mr. Davis testified? A. No, I wasn't; on the part of the day he testified I wasn't there. There were some times that I left at noon and didn't come back. Q

XQ. 1808. You were the superintendent for the Wunderlich-Oaks partnership on this Panama job? A. Yes.

XQ. 1809. You were the first man, you said, that arrived on the job for the partnership? A. Yes.

XQ. 1810. Other than yourself, did the partnership have anyone else representing it on the 2409 job that Mr. Davis would have contacted each month in connection with this cost report? A. Charles Paulda was there.

XQ. 1811. What did he do? A. He was down there part of the first year, 1941.

XQ. 1812. What did he do, please? A. He was a representative of the Wunderlich-Oaks Company.

XQ. 1813. Do you know what he did? A. I couldn't tell you what he did.

XQ. 1814. Tell his Honor, please if it is not a fact that maintenance costs and minor repairs mean substantially the same thing. A. Maintenance?

XQ. 1815. Yes, maintenance and minor repairs. A. I don't know how they are generally defined, but, myself, to maintain a piece of equipment is to put the minor things on it, the minor repairs necessary to maintain it in operation.

XQ. 1816. You have got to keep a piece of equipment in good condition in order that it can operate continuously and efficiently. A. I have always made it a practice to do so, yes.

XQ. 1817. Are you familiar with the AGC Schedule? A. Just partially.

2410 XQ. 1818. Just partially? A. Yes.

XQ. 1819. In the performance of your duties in supervising the construction of a dam such as this, you are out in the field and you ordinarily would not be concerned with disputes regarding the cost, would you? A. Very much interested, but I do not pick up the information to compile that.

XQ. 1820. It would not be your job to do that? Somebody else would do that? A. Yes.

XQ. 1821. In this case Mr. Wunderlich would have a very able mathematician representing him,

for instance, Mr. Leonard, to do work like that? A. He had several of them, I think, who were qualified for doing that work.

XQ. 1822. In any event, that would not be your special job, would it? A. No; but on the job it was under my supervision.

XQ. 1823. That is, the performance of the work was? A. Yes.

XQ. 1824. Generally, do you know what the AGC Schedule includes under the heading of "Major Repairs"? A. I can't quote it, but I can pick it out of the book.

2411 XQ. 1825. Well, depending upon the kind of equipment, they allow a certain percentage factor each year— A. (interposing) Yes; so I understand.

XQ. 1825. (resumed) —for major repairs? A. Now, generally. I am not too well informed on this. I said a moment ago, partially.

XQ. 1826. Tell his Honor, please, if it is not a fact, speaking generally, if a machine is down for one shift—that is, that it is unable to operate because of some breakdown, or something, or need for repairs—that that is classified as a minor repair? A. Yes.

XQ. 1827. And tell his Honor, please, if it is not a fact that, speaking generally, if a particular item of equipment is out of operation for more than one shift, that is generally classified as a major repair? A. I wouldn't say it was, either; depending upon

the part that went into it, whether it was major or minor, and its availability at the time the machine broke down.

XQ. 1828. I am speaking of the general practice, in order to make a line of demarcation and distinction between the two. A. It cannot be definitely divided.

XQ. 1829. You are now speaking about the major repairs and the minor? A. No—the manner in which it is done, and the time it takes.

2412 XQ. 1830. Is it not a fact, though, that practical men—I am referring now to construction contractors such as you represented—that as a general rule they recognize that if a machine is out of operation for more than one shift that it is considered to be a major repair? A. No. It all depends upon the work it takes to put it back into repair. Sometimes it wouldn't take \$4 worth of repairs and the same amount of labor, and it would take four days, and that would be a minor repair; and the time of the equipment being down is the greatest one, although the repair would be minor.

XQ. 1831. As a general practice, that you experience in all lines of equipment, such as automobiles, for instance. A. On equipment, it would be dependent on the availability of the stuff that was in the equipment. That is what determines the time that it takes to repair it, as a rule.

XQ. 1832. The cost of the part itself might be very small, but replacing that part, if you had to



tear down an engine, it would take a lot of time, would it not? A. It could take considerable time without much cost in parts.

XQ. 1833. The cost of the parts itself is not the controlling factor. It is the time involved. A. In some cases.

2413 XQ. 1834. That is, when a machine is out of use? A. In some cases.

XQ. 1835. That is the factor that usually controls, is it not, generally? A. Well, I wouldn't say that minor repairs, generally, that a lot of them; but occasionally it might and could.

XQ. 1836. As a practical proposition, contractors have to make a dividing line somewhere, and they do, do they not, between major and minor repairs? A. Yes.

XQ. 1837. And there is a distinction between them? A. Well, major repairs, the way I have always thought, and the way it is generally done, are repairs when machines are taken to the shops and torn down and major repairs made to them, and the greater part of that we always did in the winter time when the machines weren't working.

XQ. 1838. Well, Mr. Stewart, please, is it not a fact that during the summer time and during fine weather, when your machine was working, if an axle broke, or some other part of the equipment broke, you would take that piece of equipment to your shop, would you not? A. Most of the minor repairs in the working season were done in the

shop because that was where the greater part of the tools were, and most of the men, regardless of whether it was an axle. An axle is a minor repair, if it is broken in the actual operation, and it isn't a large item, either.

XQ. 1839. Where did you have your repair shop? It was right on the job, was it not? A. It was within 100 feet—less than 100 feet from the dam embankment.

XQ. 1840. But it was right on the job, was it not? A. Yes. The work surrounded it.

XQ. 1841. About how many men did you employ there? A. That varied.

XQ. 1842. It varied from time to time? A. Depending upon the amount—we had enough to keep the equipment in condition.

XQ. 1843. Say, when the equipment was working constantly and you were having some of these difficulties and encountered, say, difficult terrain, or something else, say, that damaged your machines, they were then removed to the shop, were they not, for repairs? A. Yes, if they were in shape that they could get to the shop. That was the cheapest place to repair them.

XQ. 1844. About what number of mechanics would you have during those periods? A. Depending upon what was required to work on the equipment, we had that many.

XQ. 1845. Two or three or five? A. It might be two or three. It might be 25.

2415 XQ. 1846. Mr. Stewart, in your capacity as superintendent for the plaintiff, you did not have anything to do with keeping the books up in Jefferson City, did you? A. No.

XQ. 1847. You do not know anything about how the contractor set up his costs, and so forth? A. I know they had an office in Jefferson City. What they were doing there I couldn't tell you.

~~XQ. 1848.~~ XQ. 1848. You just do not know? A. No. We kept the records on the job, if it was compiled on the job, that is, put up in forms—some of it was. But, as far as the job records from Vallecito, they stayed there, the most of them; until the job was finished. If there was anything sent to Jefferson City, I don't know, and I could not state whether there was any or not sent to Jefferson City.

XQ. 1849. You kept job records? A. I didn't.

XQ. 1850. You did not personally? A. No.

XQ. 1851. But job records were kept by the company at the site? A. Yes.

XQ. 1852. And men were employed to keep those records, such as Mr. Howard, who is now dead, who testified in this case? A. Yes, and there were others.

2416 XQ. 1853. Jim Handy? A. Yes.

XQ. 1854. You are familiar with and you were present in court when Mr. Howard testified, were you not? A. Yes.

XQ. 1855. And you have some familiarity with the schedule of maintenance cost that was put in

evidence by the plaintiff as its Exhibit 17-D? A. I wouldn't want to commit myself to memory on it, and Mr. Howard testified on it.

XQ. 1856. You are familiar, though, with the fact that he testified regarding maintenance costs, and so forth? A. Yes, he did.

XQ. 1857. That was his job, was it not? A. To keep the records—that is right, sir.

XQ. 1858. And you could not go out there and check those records, could you? You did not have time? A. I didn't have to check all the records, although I was interested in it.

XQ. 1859. Now, are you also familiar with Plaintiff's Exhibit 17 that was put in evidence? A. I would have to see it.

Mr. Sweeney: Let us get that.

(The document was produced.)

XQ. 1860. We show you a photostatic  
2417 copy of a document that has been offered in evidence and marked "Plaintiff's Exhibit Number 17-E. It is captioned "Schedule Showing Hourly Rental Repair and Fuel and Lubricant Rates, etc., on Equipment Used on Vallecito Dam Project, etc." Referring to Column 9, please, that is captioned "Plus Maintenance Rate Figured at Actual Cost."

Now, tell his Honor, please, do you know whether or not the plaintiff included in that any—if that figure does not include all items of repair that were made during the operating season? A. I have testi-



fied before that I do not know how this figure was arrived at.

XQ. 1861. You just do not know about that? That was somebody else's job to tend to that? A. To keep the records and figure out the rental rates.

XQ. 1862. In the course of your direct examination, you testified regarding the cost of parts and labor on the Panama job.

Now, tell his Honor, please, if it is not a fact that the cost of parts on the Panama job was greater than at Vallecito. A. I would have to compare the figures to tell you.

XQ 1863. You would have to check that?  
2418 A. Yes.

XQ. 1864. But, as a general proposition, based on your experience as a superintendent, and knowing that the parts would have to be shipped from the United States—as a general proposition, it would be greater? A. Please repeat the question.

(Question Number 1864 was read by the reporter, as above recorded.)

A. Greater than what?

XQ. 1865. Greater than the cost of similar parts on the Vallecito job. A. Each item may be—each item of parts.

XQ. 1866. The same question, please, with respect to labor—that is, the comparison between your Vallecito job and the Panama job. Skilled labor, I am talking about. You would have to pay more to get men to go to the Tropics? A. Our wage scale was higher in Panama.

XQ. 1867. That higher rate, would obviously have been reflected in any cost relating to the performance of the Panama job, would it not? A. It should.

XQ. 1868. Now, tell his Honor, please, if it is not a fact that one of the major items of maintenance costs of any such job as this, particularly in Panama, would be the cost of labor. A. That depends upon the repair that is to be done, if you are  
2419 speaking of repairs.

XQ. 1869. Skilled labor. A. It depends upon the part that must be repaired—

XQ. 1870. (interposing) And the parts also constitute— A. (resumed) —as to whether the cost would be greater in labor or greater in parts.

XQ. 1871. And the cost of parts also constitutes one of the major items of maintenance? A. Labor and parts and the expense relating thereto is the major cost of any repair.

XQ. 1872. Consequently, it follows that the maintenance costs in Panama would have been higher than at the Vallecito job—is that not a fact, as a general proposition? A. It depends upon how you are applying it.

XQ. 1873. As a general proposition. A. By the unit of excavation, or work to be done, by the hour, or for the full job, for all the equipment—it depends upon how you mean.

XQ. 1874. Taking into consideration that both jobs were performed in the same manner, so far

as they involved earth removal and using similar equipment. A. No, they didn't.

Mr. Ruddiman: I move to strike that out, and object to that question. There has been no proof that the jobs were similar.

2420 Mr. Sweeney: I said "assuming," if your Honor please.

Mr. Ruddiman: There is no basis for the assumption.

Mr. Sweeney: Earth removing jobs, and using similar items of equipment—there has been plenty of testimony that on jobs of this kind they used substantially the same equipment. Perhaps some items were a little larger.

Commissioner Evans: Objection overruled.

Mr. Sweeney: May I ask your Honor to indulge me just a moment, please, until I formulate a question?

Commissioner Evans: Yes.

(There was a short pause.)

By Mr. Sweeney:

XQ. 1875. Now, with respect, please, to operations in Borrow Pit Number 1, tell his Honor, please, if it is not a fact that you had some laborers and also a truck at times removing cobbles from that material—that is, plus 5 inch cobbles from that material. A. That came from Borrow Pit 1?

XQ. 1876. Yes. A. And where would this equipment be?

XQ. 1877. On the fill. A. No.

XQ. 1878. You did not have any there? A. No. The rock that came out of Borrow Pit 1 was thrown off to the side as the shovel came through, 2421 and that was thrown off the dump by the regular laborers that were on the dump for picking roots and helping on the embankment.

XQ. 1879. Tell his Honor, please, if it is not a fact that it was their job to pick out rocks, among other things, including roots, from the fine materials that were put in the fill. A. I just said the men that were put there—that were on the embankment for the purpose of picking up roots, if there was an occasional stone came into the embankment, they picked it up, or the dump man would, or the water man did it—whoever was around. There was no crew put there for the express purpose of taking stones that came in from Borrow Pit Number 1 and taking them from the embankment and putting them into the Number 4 section.

XQ. 1880. You do not mean to tell the Court that you did not obtain any plus 5 cobbles from Borrow Pit Number 1? A. I wouldn't say we didn't obtain any. The quantity was negligible. It was so negligible that it wasn't necessary to set up any labor or crew to remove it.

XQ. 1881. It was negligible as compared with the quantity of cobble that you encountered in Pit Number 2? A. It was a negligible amount compared to the quantity of earth from Pit Number 1.

XQ. 1882. But you would have to get cobbles to



build that dam? A. Yes, but we didn't get  
2422 them from Number 1.

XQ. 1883. But you would have to get them from some source, would you not? A. Yes.

XQ. 1884. And, as indicated in bid item which you submitted, on Page 46— A. (interposing) In the year 1940 we got them from Pit Number 2.

XQ. 1885. I am discussing bid items which contemplated that you would place 250,000 cubic yards of cobble. A. That was what it was estimated it would take.

XQ. 1886. And if you did not get those cobbles from Pit Number 1, or from the required structural excavation, you had to get them from some other source, did you not? A. If we didn't get them from the structural excavation, there was supposed to be a borrow pit, and there was none came out of there until after I left the job.

XQ. 1887. And that is Item 17, and the quantity set up is 50,000? A. Yes.

XQ. 1888. That was set up as a deficiency in case you did not get enough from the required structural excavation? A. Yes. There was a deficiency amounting to a great lot more than this after the structural excavation, or the required excavation was completed.

2423 XQ. 1889. Are you familiar with the fact that you were actually paid for placing 331,000 cubic yards? A. If I checked it I could familiarize myself with it.

XQ. 1890. Mr. Stewart, did I understand you correctly to testify that all overhauling on the equipment was done during the winter time? A. I don't know if I said—I don't remember if I said all, or not.

XQ. 1891. What are the facts, if I did not understand you correctly? A. But the greatest part of the overhauling and major repairs were made in the winter time. When we first started the job there was some of the equipment come from Wolf Creek Pass. That was repaired before it went to work.

There was one Loraine shovel that was completely gone over, or, that is, major repair performed on it, before it went to work.

XQ. 1892. Do you remember the D-8 tractors that you had on the job? A. Yes, I think we had 13 D-8 tractors.

XQ. 1893. And do you remember the condition in which they were when they came on the job? A. Quite well, yes, sir.

XQ. 1894. They came off the Wolf Creek  
2424 Pass job, did they not? A. Some of them. I can't tell you how many—four or five.

XQ. 1895. That job was performed up in very rugged country, up at an elevation of 8,000 odd feet, was it not? A. I think some of it was over 8,000, and some of it was lower than the elevation at the Vallejo Dam.

XQ. 1896. Tell his Honor, please, if it is not a fact that a considerable part of that equipment to

which we have just referred, when it was brought in to the Vallecito Dam job, it had to be practically rebuilt? A. That is not a fact.

XQ. 1897. What are the facts? A. The fact is, when that equipment came in there, there was lower rollers—that is, track rollers—that were in bad shape. We replaced them and put the equipment to work immediately. Most of the tractors that came in to the job went to work at once.

XQ. 1898. You say they were put to work at once? Is it not a fact that some of those tractors had to be practically torn down and put in condition, so that you could put them to work at once? A. No, that is not a fact.

XQ. 1899. I also understood you to testify that maintenance costs—I believe you qualified it somewhat—in some instances exceed the cost of 2425 major repairs—that is, on a difficult job. Did you testify to that? A. I don't remember if I testified to that or not.

XQ. 1900. First, taking into consideration maintenance expenses— A. (interposing) Yes.

XQ. 1901. There is a distinction between maintenance expenses and major repairs.

Now, I understood you to testify, in substance, that in some cases, particularly on difficult jobs, the maintenance costs sometimes exceed the cost of major repairs. A. If the time and everything is taken into consideration, it could.

XQ. 1902. Now, with regard to this job, you would not say, though, that the maintenance cost

would have exceeded the cost of major repairs, would you? A. Which job?

XQ. 1903. We are talking about the Vallecito job. A. Please repeat the question.

(Question Number 1902 was read by the reporter, as above recorded.)

A. In many instances it would and could.

XQ. 1904. That would be true of any job, would it not, depending upon if you had an accident to a machine, or something? A. It could be.

2426 XQ. 1905. Was there anything unusual about the job down here at Vallecito, as compared with other similar dam jobs, if you know? A. Not compared with other similar dams in similar locations and similar conditions.

XQ. 1906. You do not mean to tell the Court, please, that the maintenance costs on every item of equipment used on the Vallecito job would have exceeded the cost of major repairs on the job? A. I didn't tell him that.

XQ. 1907. And you would not, would you? A. I didn't tell him that.

XQ. 1908. As a matter of fact, they did not, did they? A. I didn't tell him that, and I wouldn't tell him that.

XQ. 1909. Do you remember that you testified regarding the 12 and 15-yard Euclid trucks that came on the job—testified regarding their condition? A. At what time?

XQ. 1910. At the time they came on the job? A. The 12 and the 15-yard ones?



XQ. 1911. Yes. A. Yes, I testified to that.

XQ. 1912. The Euclid trucks? A. Yes.

2427 XQ. 1913. Do you recollect that some of the trucks had been used on the Ogollalla, Nebraska, job before they were brought to the Vallecito job? A. I don't remember if there was any used on the Ogollalla job. The 12 and 15-yard trucks; when I received them, were new trucks, and the only use I know they had or running they had before was in traveling to the job.

XQ. 1914. Do you know whether or not some of them were classified as, perhaps, second hand, that they had been used on other jobs, perhaps at least two other jobs, by the Wunderlich Company? A. I don't know that.

XQ. 1915. You do not know that? A. I was not aware of that. I thought they were new trucks. They appeared to be new trucks. They operated like new trucks.

XQ. 1916. You also testified regarding the comparative cost of making repairs to the sheepsfoot rollers.

Tell his Honor, please, if it is not a fact that, out of a number of sheepsfoot rollers that you had on the job, three of them were secondhand? A. Either two or three.

XQ. 1917. Three out of the four? A. If we had four, three of them were secondhand.

2428 XQ. 1918. And they were practically worn out, were they not, when they were brought to the job? A. No.

XQ. 1919. Tell his Honor, please, if it is not a fact that one of the three that have been referred to as secondhand, had to be completely overhauled before it could be used on the job. Do you recollect that? A. We may have overhauled it before we used it on the job; but the only new roller we had, in order to get it to operate properly, cost us more than any one of the three used ones we had. In order to get it to operate properly, it cost us more than any one of the three rollers that were used.

XQ. 1920. In other words, a new piece of equipment cost more than a secondhand piece? A. Yes, it did, to keep up and keep in shape so that it would operate properly.

XQ. 1921. And you would probably have to pay more for a new piece of equipment than three, or probably a half a dozen secondhand ones. A. I don't know what the new one cost, and I don't know what the second hand ones cost.

XQ. 1922. Speaking from memory, you would not tell the Court that you recollect those facts? A. What facts?

XQ. 1923. The facts to which you are testifying now—you could not recall them with certainty? A. I recall the time it took us—I mean, I know it took us a lot of time to do various things. I remember such things as that. I can't remember definite times or amounts of time.

XQ. 1924. Do you remember that you had considerable difficulty on the job because of the fact that

your sheepsfoot rollers were not operating efficiently, the teeth wore out and probably the water tanks leaked and wouldn't carry the necessary ballast, and so forth? A. No, that is not a fact.

XQ. 1925. You do not recollect it? A. To be a fact—no.

XQ. 1926. You have also testified regarding the charging of parts on this job to pieces of equipment. I believe you testified that they were not charged out until they were actually placed on the equipment.

Do you know that, as a matter of fact, yourself, not having kept these books or records? A. Right on the job was our Parts Department. We had a man, two shifts, in charge of that Parts Department. He kept a record and had a sheet at the window and every part that went out of there was charged to the piece of equipment it went to, if it was bolts, nuts, washers, or parts, or any-  
2430 thing else.

XQ. 1927. Do you know whether or not the company's office records would reflect that at Jefferson City? A. The records that he kept went direct to the office.

XQ. 1928. You do not know? A. They went to the office for that purpose.

XQ. 1929. You do not know what the company at Jefferson City—what their records reflect, do you? A. No.

XQ. 1930. You do not know, even, if they kept

any records until they were prepared to make a claim on this job in 1940? A. Who?

XQ. 1931. The Wunderlich Company. A. I know they kept records. I know the records on parts, time, loads and all of that was kept.

XQ. 1932. You do not know what kind of a bookkeeping system they kept at Jefferson City, do you? A. I can't explain it. As a rule, various operators use various methods of keeping books.

XQ. 1933. We want to know with certainty what you know about this job, though. And what they did with regard to keeping records, you yourself do not know personally? A. How they kept them—no; or what method they used.

XQ. 1934. You testified regarding the loss of operating efficiency, particularly, of motors at 2431 altitudes of 7500 feet, referring to Valle-cito. A. Repeat that, please.

(Question Number 1934 was read by the reporter, as above recorded.)

XQ. 1935. Do you remember that? A. Yes, I testified to the operations of equipment and motors at various elevations.

XQ. 1936. And you said at sea level the motors would operate more efficiently. A. Yes.

XQ. 1937. Now, with respect to conditions at Panama, is it not a fact that at that low elevation you will encounter more mud and water at Panama and at other tropical places, than you did at Valle-cito? A. At times, we did.



XQ. 1938. Is it not a fact that that would very greatly impair the operating efficiency of your machines? A. When we had heavy rains there, it was necessary to shut down.

XQ. 1939. You shut down completely? A. But we didn't work in the heavy mud.

XQ. 1940. And following the heavy mud, you went to work as quickly as you could, and that would be a great strain on machinery, would it not?

A. If we did.

2432 XQ. 1941. And that might break and wreck them? A. If we did, we could wreck them.

XQ. 1942. Now, with respect to Vallecito, please, tell his Honor, please, if it is not a fact that as soon as the cold weather struck at that high elevation, which was somewhat early, that you shut down operations and that you only operated during the, say, better parts of the working season. A. Are you referring to the operation at the project?

XQ. 1943. At Vallecito. A. That is not true.

XQ. 1944. I am referring, now, of course, to the major part of the job—the placing of the earth fill on the embankment. A. The placing of the earth fill on the embankment—yes. We could not place that under freezing conditions—placing the earth fill on the embankment.

XQ. 1945. That was the major part of the work, was it not—excavating and placing? A. That was

the major item. I would not testify that it was the major part of the work.

XQ. 1946. You could not do that under freezing conditions; could you? A. Not placing the 2433 earth embankment.

XQ. 1947. And tell his Honor, please, if it is not a fact that that part of the work which you have just mentioned was shut down about four or five months out of the year due to freezing weather. A. Three to five months—somewhere in there.

Mr. Sweeney: That is all, if your Honor please, on that.

Commissioner Evans: Note a recess.

(There was a short recess.)

### Redirect Examination

By Mr. Ruddiman:

RDQ. 1948. Mr. Stewart, do you know of any general practice of the trade which classifies repairs which take one shift or less as minor repairs, and repairs that take more than one shift as major repairs? A. No.

RDQ. 1949. Did you have to put additional men or equipment on the embankment to take care of removal of plus 5 inch rocks from material which had come from Pit Number 1? A. No.

RDQ. 1950. During the 1940 working season were overhauls or major repairs performed at the Vallecito job? A. Repeat that, please.

(Question Number 1950 was read by the reporter, as above recorded.)

Mr. Sweeney: Objected to, if your Honor  
2434 please, unless a foundation is laid to indicate  
just what are major repairs and overhauls.  
Otherwise, the question is too general.

Commissioner Evans: Subject to cross examination, the objection is overruled.

A. No, we didn't.

By Mr. Ruddiman:

RDQ. 1951. Are the D-8 tractors involved in  
Claim Number 17, Mr. Stewart? A. I think there  
are some.

Commissioner Evans: What do you mean "involved"?

By Mr. Ruddiman:

RDQ. 1952. I meant, did they perform work in  
Borrow Pit Number 2? A. Yes.

RDQ. 1953. I show you Defendant's Exhibit  
Number 17-R, and point out, at Page 12 of that exhibit,  
Shovel Number 2. How long was that shovel  
on the job in Panama? A. It arrived on the job in  
March of 1941, and the work that it worked on was  
completed in the month of May, 1943.

RDQ. 1954. How many months during the year  
did you work in Panama? A. We worked all the  
months in the year.

RDQ. 1955. During the dry season how many  
shifts did you work? A. Worked seven days a  
month, two ten-hour shifts—seven days a  
2435 week, two ten-hour shifts per day.

RDQ. 1956. And how many shifts did you work during the rainy season? A. One shift a day.

By Commissioner Evans:

RDQ. 1957. Can you define those seasons for us? A. One season would be the dry season. The other one would be a wet season; and the wet season, we worked one shift a day whenever climatic conditions warranted, or would permit us. And where it did permit us to work, we worked seven days a week, ten hours a day.

RDQ. 1958. What months were the dry season, and what months were the wet season? A. The dry season, as a rule, starts in the month of November and continues through the month of June. That will vary considerably.

Commissioner Evans: All right. Go ahead.

By Mr. Ruddiman:

RDQ. 1959. Was it during November to June that you worked two shifts? A. November to June would be the two-shift period.

RDQ. 1960. What was the size of the Number 2 shovel? A. It was a 3½ yard, Model 12 Lima—that should be a 1201 Lima.

Mr. Ruddiman: That is all.

2436

Recross Examination

By Mr. Sweeney:

RXQ. 1961. On redirect, Mr. Stewart, you testified that there was no general practice with respect



to, classifying minor repairs as being made on equipment that is down for only one shift, and that if the equipment is down for more than one shift it is classified as major repairs. A. No, I didn't testify if it was down for more than one shift it would be classified as major repairs.

RXQ. 1962. Tell his Honor, please, if it is not a fact that it is the usual, standard practice— A. (interposing) No, it is not.

Mr. Sweeney: Wait a minute, please.

RXQ. 1962. (resumed) —to consider anything that requires a piece of equipment to be down for not over one shift to be classed as minor repairs.

A: Please repeat that.

(Question Number 1962 was read by the reporter, as above recorded.)

Mr. Sweeney: Add, "or maintenance." A. I stated before, minor repairs can run from a few minutes to several shifts..

RXQ. 1963. Now, Mr. Stewart, please, I believe you gave your age as 42 in 1946, when you testified in this case. A. In 1946 I was 44.

2437 RXQ. 1964. Forty-four.

Do you recollect that on June 13, 1945, testifying in Denver, you were asked the question: "Give your name and age." And you testified: "B. H. Stewart, 42 years of age."

Do you recollect that? A. Yes, but I corrected that later to 43, at the time of the testimony. I was 42 in part of 1945.

RXQ. 1965. You went on this job in 1938? A. Yes—13 days after I was 36.

RXQ. 1966. You also testified on redirect that during 1940 no charges were made for overhauling or major repairs—is that a fact—on the Vallecito job? A. No, it is not.

RXQ. 1967. What did you testify? A. I did not testify to that. It is in the record what I testified. If I am asked the same question—

RXQ. 1968. I understood you to testify that no major repairs were made—no charges were made for major repairs on this job in 1940. A. I don't think I so testified.

RXQ. 1969. What did you testify, please? A. I do not remember that.

RXQ. 1970. What did you testify? A. What was I asked?

RXQ. 1971. Were charges made for major 2438 repairs on this job in 1940? A. I did not testify that they were.

RXQ. 1972. Were they, I am asking you?

By Commissioner Evans:

RXQ. 1973. What is your answer now? Were they or were they not? A. I do not think so.

By Mr. Sweeney:

RXQ. 1974. Do you know, Mr. Stewart, please? A. Not to the extent that I would want to state that there was or there wasn't.

RXQ. 1975. Well, if no such separate charges were set up, it follows as a fact, does it not, that

all of the repairs made in the 1940 season would be included under the item of maintenance expense?

A. If there was no major repairs.

RXQ. 1976. With respect, please, to the earth materials that were moved from the earth Borrow Pit Number 1, tell his Honor, please, if it is not a fact that you had a crew of men working on the fill whose job it was to remove plus 5 inch rock. A. That is not a fact.

RXQ. 1977. Is it not a fact, though, that you did have some men on the fill? A. We had some men on the fill.

RXQ. 1978. And that was a part of their duties; to remove plus 5 inch rock? A. If any such  
2439 stones came from Pit Number 1 to the embankment they removed them—not only the men, but such equipment that could remove them, that was working on the fill for the purpose of placing the fill.

RXQ. 1979. And tell his Honor, please, if it is not a fact that there was some 5 inch rock that had to be removed from the fill. A. I stated before that there was an occasional plus 5 inch and such rock—stones that were removed from the material that came from Borrow Pit Number 1, the cost of the same was absorbed in our embankment costs—placing earth fill embankment cost.

RXQ. 1980. Now, you were the superintendent on this job? A. Yes.

RXQ. 1981. Tell his Honor, please, if it is not a fact that payment for this work, as provided by the

specifications, included the cost of placing the rocks we have just mentioned.

Mr. Ruddiman: I am going to object to that question. It calls for an interpretation of the specifications.

Mr. Sweeney: I refer to Item 19, please, of the schedule. Would you refer to that?

Commissioner Evans: Is the purpose of the question to lay a foundation for something?

Mr. Sweeney: It is to lay a foundation, 2440 if your Honor please.

Commissioner Evans: Objection overruled.

By Mr. Sweeney:

RXQ. 1982. Referring to the petition, Page 46, and particularly to Item 19, "Earth Fill and Embankment—3,200,000 cubic yards, at 5 cents," tell his Honor, please, if it is not a fact that the cost of removing the rocks which you have just mentioned was included in that item, if you know. A. If there was any stones came from Borrow Pit Number 1 of the earth borrow pit, that went to the embankment, we removed them and put them in the cobble fill section. The crew was set up—

Commissioner Evans (interposing): The question is, does the contract provide for the payment, if you know.

Mr. Ruddiman: I make the same objection as before.



Commissioner Evans: Mr. Sweeney is laying a foundation for another question. As such, I will permit it. If it is a matter of a conclusion, I will not permit it.

The Witness: I don't understand what Mr. Sweeney means—if it is making up the earth embankment with this 3,200,000 yards, as shown under Item 19.

By Mr. Sweeney:

RXQ. 1983. Referring to Paragraph 55 of the specifications, and I will point that out for you—refer, please, to Paragraph C—to Subparagraph C of Paragraph 55 of the specifications, which 2441 reads, in pertinent part: “Should stone of such size be found in otherwise approved earth-fill embankment materials; they shall be removed by the contractor either at the site of excavation or after transporting to the embankment, but prior to rolling and compacting the materials in the embankment.”

Now, bearing in mind that provision of the specifications, is it not a fact that the cost of removing the plus 5 rocks that you have just mentioned, would be included under Item 19 of the bid schedule? A. From the earth borrow pit—such stones that were found in the earth borrow pit, would be.

RXQ. 1984. And, now, please, tell his Honor if it is not a fact that payment for any item of plus 5 cobbles that you had to remove from either Pit Number 1 or Number 2 would be included under that item of the contract.

Mr. Ruddiman: Same objection.

Commissioner Evans: Mr. Sweeney, I still do not see what you are leading up to. If this is a matter of argument and conclusion of the witness, it ought not to go on.

Mr. Sweeney: No, it is not. I am trying to show that he was required to do that and was paid for it.

Commissioner Evans: If that is the only purpose, that is a conclusion. That is the purpose of the lawsuit.

Mr. Sweeney: We will not press that, if your Honor please.

2442 That is all, if your Honor please, on recross.

Mr. Ruddiman: That is all.

Mr. Leonard, will you take the stand.

**George P. Leonard**, a witness produced on behalf of the plaintiff, having been previously duly sworn by the Commissioner, was further examined, and in answer to interrogatories, testified as follows:

#### Further Direct Examination

By Mr. Ruddiman:

Q. 439. Mr. Leonard, following the time—

Commissioner Evans (interposing): Pardon the interruption. What claim is this?

Mr. Ruddiman: Still on Claim Number 17.

Commissioner Evans: All right.

By Mr. Ruddiman:

Q. 440. Mr. Leonard, following the time that plaintiff put in its testimony at Denver, did one of the defendant's auditors check the plaintiff's records and costs? A. It did.

Mr. Ruddiman: That is all.

Mr. Sweeney: No cross, your Honor.

Commissioner Evans: All right.

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